

ENTERED  
ON DOCKET  
AUG 15 2003  
BY DEPUTY *CMJ*

CBNSP 22 276ORMLEY  
8/14/03

FILED	LODGED
RECEIVED	
AUG 14 2003	
CLERK U.S. DISTRICT COURT WESTERN DISTRICT OF WASHINGTON AT TACOMA	
BY	

FILED	LODGED
RECEIVED	
AUG 04 2003	
CLERK U.S. DISTRICT COURT WESTERN DISTRICT OF WASHINGTON AT TACOMA	
BY	

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF  
WASHINGTON

UNITED STATES OF AMERICA

Plaintiffs,

v.

COOK'S MARINE SPECIALTIES,  
STUART COOK, SIMPSON TACOMA  
KRAFT COMPANY, LLC, SIMPSON  
TACOMA LAND COMPANY,  
CITY OF TACOMA,  
CITY OF TACOMA, DEPT. OF PUBLIC  
UTILITIES,  
WASHINGTON DEPARTMENT OF  
NATURAL RESOURCES, AND  
WESTERN MACHINE WORKS

Defendants.

CIVIL ACTION NO. CO3-5331 (RJB) FDB

RD/RA CONSENT DECREE

CONSENT DECREE  
FOR REMEDIAL DESIGN AND REMEDIAL ACTION AT THE  
MIDDLE WATERWAY PROBLEM AREA  
OF THE COMMENCEMENT BAY NEARSHORE  
TIDEFLATS SUPERFUND SITE

USEPA SF  
1360764

03-CV-05331-ORD

AUG 18 2003

90-11-2-729/1

## TABLE OF CONTENTS

<b><u>I. BACKGROUND</u></b>	<b><u>1</u></b>
<b><u>II. JURISDICTION</u></b>	<b><u>8</u></b>
<b><u>III. PARTIES BOUND</u></b>	<b><u>8</u></b>
<b><u>IV. DEFINITIONS</u></b>	<b><u>9</u></b>
<b><u>V. GENERAL PROVISIONS</u></b>	<b><u>16</u></b>
<b><u>VI. PERFORMANCE OF THE WORK BY PERFORMING DEFENDANT</u></b>	<b><u>19</u></b>
<b><u>VII. REMEDY REVIEW</u></b>	<b><u>27</u></b>
<b><u>VIII. QUALITY ASSURANCE, SAMPLING, AND DATA ANALYSIS</u></b>	<b><u>28</u></b>
<b><u>IX. ACCESS AND INSTITUTIONAL CONTROLS</u></b>	<b><u>30</u></b>
<b><u>X. REPORTING REQUIREMENTS</u></b>	<b><u>37</u></b>
<b><u>XI. EPA APPROVAL OF PLANS AND OTHER SUBMISSIONS</u></b>	<b><u>39</u></b>
<b><u>XII. PROJECT COORDINATORS</u></b>	<b><u>42</u></b>
<b><u>XIII. ASSURANCE OF ABILITY TO COMPLETE WORK</u></b>	<b><u>43</u></b>
<b><u>XIV. CERTIFICATION OF COMPLETION</u></b>	<b><u>44</u></b>
<b><u>XV. EMERGENCY RESPONSE</u></b>	<b><u>48</u></b>
<b><u>XVI. PAYMENTS FOR RESPONSE COSTS</u></b>	<b><u>49</u></b>
<b><u>XVII. INDEMNIFICATION AND INSURANCE</u></b>	<b><u>53</u></b>
<b><u>XVIII. FORCE MAJEURE</u></b>	<b><u>55</u></b>
<b><u>XIX. DISPUTE RESOLUTION</u></b>	<b><u>58</u></b>
<b><u>XX. STIPULATED PENALTIES</u></b>	<b><u>62</u></b>
<b><u>XXI. COVENANTS NOT TO SUE BY PLAINTIFF</u></b>	<b><u>68</u></b>
<b><u>XXII. COVENANTS BY SETTLING DEFENDANTS</u></b>	<b><u>72</u></b>
<b><u>XXIII. EFFECT OF SETTLEMENT; CONTRIBUTION PROTECTION</u></b>	<b><u>75</u></b>
<b><u>XXIV. ACCESS TO INFORMATION</u></b>	<b><u>77</u></b>
<b><u>XXV. RETENTION OF RECORDS</u></b>	<b><u>78</u></b>
<b><u>XXVI. NOTICES AND SUBMISSIONS</u></b>	<b><u>80</u></b>
<b><u>XXVII. EFFECTIVE DATE</u></b>	<b><u>81</u></b>
<b><u>XXVIII. RETENTION OF JURISDICTION</u></b>	<b><u>81</u></b>
<b><u>XXIX. APPENDICES</u></b>	<b><u>82</u></b>
<b><u>XXX. COMMUNITY RELATIONS</u></b>	<b><u>82</u></b>
<b><u>XXXI. MODIFICATION</u></b>	<b><u>83</u></b>
<b><u>XXXII. LODGING AND OPPORTUNITY FOR PUBLIC COMMENT</u></b>	<b><u>84</u></b>
<b><u>XXXIII. SIGNATORIES/SERVICE</u></b>	<b><u>84</u></b>
<b><u>XXXIV. FINAL JUDGMENT</u></b>	<b><u>85</u></b>

## **I. BACKGROUND**

A. The United States of America ("United States"), on behalf of the Administrator of the United States Environmental Protection Agency ("EPA"), filed a complaint in this matter pursuant to Sections 106 and 107 of the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. §§ 9606 and 9607.

B. The United States in its complaint seeks, inter alia: (1) reimbursement of costs incurred by EPA and the Department of Justice for response actions at the Commencement Bay Nearshore/Tideflats Superfund Site ("CB/NT Superfund Site") Middle Waterway Problem Area Superfund Site in Tacoma, Washington, together with accrued interest; and (2) performance of studies and response work by the defendants at the Middle Waterway Problem Area consistent with the National Oil and Hazardous Substance Pollution Contingency Plan, 40 C.F.R. Part 300 (as amended) ("NCP").

C. The State of Washington owns and the Washington Department of Natural Resources ("DNR") manages certain state-owned aquatic lands in the Middle Waterway.

D. In accordance with the NCP and Section 121(f)(1)(F) of CERCLA, 42 U.S.C. § 9621(f)(1)(F), EPA notified the State of Washington (the "State") on March 18, 2002, of negotiations with potentially responsible parties regarding the implementation of the remedial action for the Middle Waterway Problem Area, and EPA has provided the State with an opportunity to participate in such negotiations and be a party to this Consent Decree.

E. In accordance with Section 122(j)(1) of CERCLA, 42 U.S.C. § 9622(j)(1), EPA notified the National Oceanic and Atmospheric Administration of the U.S. Department of

Commerce, the Fish and Wildlife Service of the Department of Interior, the Puyallup Tribe of Indians, the Muckleshoot Indian Tribe, and Bureau of Indian Affairs on March 18, 2002, of negotiations with potentially responsible parties regarding the release of hazardous substances that may have resulted in injury to the natural resources under Federal and Tribal trusteeship and encouraged the trustees to participate in the negotiation of this Consent Decree.

F. In a consent decree entered in United States District Court for the Western District of Washington, on December 30, 1997 in *United States et al. v. Washington State Through the Department of Natural Resources*, Civil Action No. C97-5337 RJB, DNR resolved its liability for damages for injury to natural resources under federal trusteeship resulting from the release of hazardous substances at the CB/NT Site.

G. In a consent decree entered in United States District Court for the Western District of Washington, on May 28, 1997 in *United States, et al. v. The City of Tacoma and the Tacoma Public Utilities*, Civil Action No. C97-5336-RJB, the City of Tacoma and Tacoma Public Utilities resolved their liability for damages for injury to natural resources under federal, state and tribal trusteeship resulting from the release of hazardous substances at the CB/NT Site.

H. In a consent decree entered in the United States for the Western District of Washington, on December 13, 1991 in *United States, et al. v. Simpson Tacoma Kraft Company, et al.*, Civil Action No. C91-5260-OTC, as amended on April 1, 1996, Simpson Tacoma Kraft Company resolved its liability for damages for injury to natural resources under federal, state and tribal trusteeship resulting from the release of hazardous substances at the CB/NT Site.

I. In 2001, the City completed an intertidal habitat restoration project in and adjacent to Area C of the Middle Waterway pursuant to the consent decree described in Paragraph G.

J. The defendants that have entered into this Consent Decree ("Settling Defendants") do not admit any liability to the Plaintiff arising out of the transactions or occurrences alleged in the complaint, nor do they acknowledge that the release or threatened release of hazardous substances at or from the Site constitutes an imminent or substantial endangerment to the public health or welfare or the environment.

K. Pursuant to Section 105 of CERCLA, 42 U.S.C. § 9605, EPA placed the CB/NT Superfund Site on the National Priorities List ("NPL"), set forth at 40 C.F.R. Part 300, Appendix B, by publication in the Federal Register on September 8, 1983, 48 Fed. Reg. 40658.

L. In response to a release or a substantial threat of a release of a hazardous substance(s) at or from the CB/NT Superfund Site, EPA entered into a CERCLA Cooperative Agreement with the State of Washington Department of Ecology ("Ecology") to conduct a Remedial Investigation and Feasibility Study ("RI/FS") for the CB/NT Site pursuant to 40 C.F.R. § 300.430.

M. Ecology completed a Remedial Investigation ("RI") on contaminated sediments and sources and the results were published in August 1985. The results of the Feasibility Study ("FS") were published in February, 1989.

N. Pursuant to Section 117 of CERCLA, 42 U.S.C. §9617, EPA published notice of the completion of the FS and of the proposed plan for remedial action on February 24, 1989, in a major local newspaper of general circulation. EPA provided an opportunity for written

and oral comments from the public on the proposed plan for remedial action. A copy of the transcript of the public meeting is available to the public as part of the administrative record upon which the Regional Administrator based the selection of the response action.

O. The decision by EPA on the remedial action to be implemented at the CB/NT Superfund Site is embodied in a final Record of Decision ("1989 ROD"), executed on September 30, 1989, on which the State had a reasonable opportunity to review and comment and on which the State has given its concurrence. The 1989 ROD includes a responsiveness summary to the public comments. Notice of the final plan was published in accordance with Section 117(b) of CERCLA, 42 U.S.C. § 9617(b).

P. The 1989 ROD addresses both sediment remediation (Operable Unit 01) and source control (Operable Unit 05). EPA has entered into Superfund Cooperative Agreements with the State and the Puyallup Tribe of Indians for remedial activities at the CB/NT Site. Under a Cooperative Agreement with Ecology, effective May 1, 1989, and in the 1989 ROD, EPA is designated as the lead agency for remediation of contaminated sediments in the waterways and Commencement Bay, and Ecology is the lead agency for source control of hazardous substances from upland areas (down to the mean high tidal elevation of the waterways). Source control is to be implemented in the upland areas that are contributing contamination to the areas identified in the 1989 ROD as requiring sediment remediation ("Problem Areas"). A support agency Cooperative Agreement was entered into with the Puyallup Tribe.

Q. As described in the RI/FS for the CB/NT site, there are nine Problem Areas of contaminated sediments and sources of hazardous substances contamination. The 1989 ROD addressed eight of the nine Problem Areas, including the Middle Waterway Problem Area. The

ninth Problem Area, the Asarco Sediments, is now a separate operable unit of the CB/NT Site.

This Consent Decree addresses remediation of Middle Waterway Problem Area.

R. On April 14, 1997, EPA and the Middle Waterway Action Committee (MWAC), which is comprised of Foss Maritime Co., Marine Industries Northwest, Inc., and Pioneer Industries, Inc., entered into an Administrative Order on Consent ("AOC") that required MWAC to prepare and perform pre-remedial and remedial design studies for the Middle Waterway Problem Area, and to reimburse EPA for its response and oversight costs related to such studies.

S. EPA approved MWAC's pre-remedial studies on August 10, 2001.

T. On July 28, 1997, EPA issued an Explanation of Significant Differences (ESD), in compliance with Section 117(c) of CERCLA, that explains differences in the Remedial Action that significantly change, but do not fundamentally alter, the remedy selected in the ROD. The 1997 ESD modified the cleanup level for remediation of marine sediments contaminated with polychlorinated biphenyls (PCBs) at the CB/NT Site.

U. On August 3, 2000, EPA issued a second ESD, in compliance with Section 117(c) of CERCLA, that explains differences in the Remedial Action that significantly change, but do not fundamentally alter, the remedy selected in the 1989 ROD. The ESD was a comprehensive document addressing cleanup plans for two waterways within the CB/NT Site, selecting disposal sites for all contaminated sediment to be dredged and confined from the CB/NT Site, as well as providing performance standards and documenting other differences to the 1989 ROD.

V. On February 4, 2002, EPA issued a third ESD, in compliance with Section 117(c) of CERCLA, that explains differences in the Remedial Action that significantly change, but

do not fundamentally alter, the remedy selected in the 1989 ROD for the Middle Waterway Problem Area. Based on the studies and analysis conducted under the AOC with respect to the Middle Waterway, this ESD provides details of: the areal extent of sediment contamination in the Middle Waterway and the volume of sediment that requires remediation; designation of areas that are projected to naturally recover within 10 years of remedial action; performance standards for mitigation for the Remedial Action; and the estimated cost of the Remedial Action at the Middle Waterway. Notice and public comment were taken on this ESD and notice of the final ESD was published in accordance with Section 117(c) of CERCLA.

W. On March 20, 2003, EPA issued a fourth ESD, in compliance with Section 117(c) of CERCLA, that explains differences in the Remedial Action for Area C of the Middle Waterway Problem Area that significantly change, but do not fundamentally alter, the remedy selected in the ROD for the Middle Waterway Problem Area. This ESD provides details of: the areal extent of subsurface sediment contamination in Area C of the Middle Waterway and the volume of such subsurface contaminated sediment that requires remediation; and the estimated cost of the remediation of Area C of the Middle Waterway. Notice and public comment will be taken on this ESD and notice of this ESD will be published in accordance with Section 117(c) of CERCLA.

X. To accomplish the Remedial Action identified in the 2003 ESD, DNR, the City of Tacoma, and Ecology will set funds aside in an Environmental Restoration Account. This Account will be established by the City of Tacoma, and funded within sixty (60) days of the date DNR signs this Decree and the City of Tacoma notifies EPA of its intent to obtain City Council approval to sign this Consent Decree.



Y. Based on the information presently available to EPA, EPA believes that the Work will be properly and promptly conducted by the Settling Defendants if conducted in accordance with the requirements of this Consent Decree and its appendices.

Z. Solely for the purposes of Section 113(j) of CERCLA, 42 U.S.C. 9613(j), the Remedial Action selected by the 1989 ROD and ESDs and the Work to be performed by the Settling Defendants shall constitute a response action taken or ordered by the President.

AA. Settling Defendants along with other settling parties have, with EPA's encouragement, achieved settlements that resolve amongst themselves and with the United States liability for cleaning up the Middle Waterway, accomplish cleanup of the Waterway, and avoid unnecessary transaction costs and litigation that could otherwise delay implementation of timely cleanup. These settlements involve the Performing Defendant's agreement to perform Remedial Action under this Consent Decree, MWAC's agreement to perform remedial action of Areas A and B under the MWAC Consent Decree, and the Funding Defendants' agreements to fund, in part, the remedial actions for the Middle Waterway Problem Area.

BB. The Parties recognize, and the Court by entering this Consent Decree finds, that this Consent Decree has been negotiated by the Parties in good faith and implementation of this Consent Decree will expedite the cleanup of the Site and will avoid prolonged and complicated litigation between the Parties, and that this Consent Decree is fair, reasonable, and in the public interest.

NOW, THEREFORE, it is hereby Ordered, Adjudged, and Decreed:

## **II. JURISDICTION**

1. This Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. §§ 1331 and 1345, and 42 U.S.C. §§ 9606, 9607, and 9613(b). This Court also has personal jurisdiction over the Settling Defendants. Solely for the purposes of this Consent Decree and resolving claims brought by the United States in the underlying complaint[s], Settling Defendants waive all objections and defenses that they may have to jurisdiction of the Court or to venue in this District. Settling Defendants shall not challenge the terms of this Consent Decree or this Court's jurisdiction to enter and enforce this Consent Decree. The Settling Defendants do not consent to jurisdiction in any other action or for any other purpose.

## **III. PARTIES BOUND**

2. This Consent Decree applies to and is binding upon the United States and upon Settling Defendants and their heirs, successors and assigns. Any change in ownership or corporate status of a Settling Defendant including, but not limited to, any transfer of assets or real or personal property, shall in no way alter such Settling Defendant's responsibilities under this Consent Decree.

3. Performing Defendant shall provide a copy of this Consent Decree to each contractor hired to perform the Work (as defined below) required by this Consent Decree and to each person representing any Performing Defendant with respect to the Site or the Work and shall condition all contracts entered into hereunder upon performance of the Work in conformity with the terms of this Consent Decree. Performing Defendant or its contractors shall provide written notice of the Consent Decree to all subcontractors hired to perform any portion of the Work required by this Consent Decree. Performing Defendant shall nonetheless be responsible for ensuring that its contractors and subcontractors perform the Work contemplated herein in

accordance with this Consent Decree. With regard to the activities undertaken pursuant to this Consent Decree, each contractor and subcontractor shall be deemed to be in a contractual relationship with the Performing Defendant within the meaning of Section 107(b)(3) of CERCLA, 42 U.S.C. § 9607(b)(3).

#### **IV. DEFINITIONS**

4. Unless otherwise expressly provided herein, terms used in this Consent Decree which are defined in CERCLA or in regulations promulgated under CERCLA shall have the meaning assigned to them in CERCLA or in such regulations. Whenever terms listed below are used in this Consent Decree or in the appendices attached hereto and incorporated hereunder, the following definitions shall apply:

"Area C" shall mean that portion of the Middle Waterway depicted in Appendix C to this Consent Decree .

"CB/NT Superfund Site" shall mean the Commencement Bay Nearshore/Tideflats Superfund Site listed on the National Priorities List on September 8, 1983, the upland boundaries of which are defined according to the contours of localized drainage basins that flow into the marine waters and the marine boundary of which is limited to the shoreline, intertidal areas, bottom sediments and waters of depths less than 60 feet below mean lower low water level. The nearshore portion of the CB/NT Superfund Site is defined as the area along the Ruston shoreline from the Mouth of Thea Foss Waterway to Pt. Defiance. The tideflats portion of the CB/NT Superfund Site includes the Hylebos, Blair, Sitcum, Milwaukee, St. Paul, Middle, Wheeler-Osgood, and Thea Foss waterways, the Puyallup River upstream to the Interstate-5 bridge, and the adjacent land areas.

"CERCLA" shall mean the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended, 42 U.S.C. §§ 9601 *et seq.*

"City of Tacoma" or "City" shall mean for the purposes of this Consent Decree only the City of Tacoma, all departments, divisions, and offices, except City of Tacoma's Department of Public Utilities, which shall be referred to as Tacoma Public Utilities ("TPU").

"Consent Decree" shall mean this Decree and all appendices attached hereto (listed in Section XXIX). In the event of conflict between this Decree and any appendix, this Decree shall control.

"Day" shall mean a calendar day unless expressly stated to be a working day. "Working day" shall mean a day other than a Saturday, Sunday, or Federal holiday. In computing any period of time under this Consent Decree, where the last day would fall on a Saturday, Sunday, or Federal holiday, the period shall run until the close of business of the next working day.

"DNR" shall mean the State of Washington as owner of state-owned aquatic lands as defined by RCW 79.90.010, as well as the Commissioner of Public Lands, and the Washington Department of Natural Resources (including its predecessor and any successor departments or agencies) as lessor, manager and/or as otherwise exercising the State of Washington's proprietary interest in such lands for the benefit of the public.

"Effective Date" shall be the effective date of this Consent Decree as provided in Paragraph 110.

"EPA" shall mean the United States Environmental Protection Agency and any successor departments or agencies of the United States.

"Ecology" shall mean the Washington Department of Ecology and any successor departments or agencies of the State.

"Funding Defendants" shall mean Cook's Marine Specialities, Stuart Cook, Western Machine Works, Simpson, City of Tacoma Department of Public Utilities, and the City of Tacoma, unless EPA determines, in its unreviewable discretion, that DNR is unable or has failed to perform, in which case the City of Tacoma will become the Performing Defendant.

"Future Oversight Costs" shall mean that portion of Future Response Costs that EPA incurs in monitoring and supervising Settling Defendants' performance of the Work to determine whether such performance is consistent with the requirements of this Consent Decree, including costs incurred in reviewing plans, reports and other documents submitted pursuant to this Consent Decree, as well as costs incurred in overseeing implementation of the Work; however, Oversight Costs do not include, *inter alia*: the costs incurred by the United States pursuant to Sections VII (Remedy Review), IX (Access and Institutional Controls), XV (Emergency Response), and Paragraph 90 of Section XXI (Work Takeover), or the costs incurred by the United States in enforcing the terms of this Consent Decree, including all costs incurred in connection with Dispute Resolution pursuant to Section XIX (Dispute Resolution) and all litigation costs.

"Future Response Costs" shall mean all costs, including, but not limited to, direct and indirect costs, that the United States incurs after the Effective Date of this Consent Decree in reviewing or developing plans, reports and other items pursuant to this Consent Decree, verifying the Work, or otherwise implementing, overseeing, or enforcing this Consent Decree, including, but not limited to, payroll costs, contractor costs, travel costs, laboratory costs, the costs incurred pursuant to Sections VII, IX (including, but not limited to, the cost of attorney time and any monies

paid to secure access and/or to secure or implement institutional controls including, but not limited to, the amount of just compensation), XV, and Paragraph 90 of Section XXI.

"Interest," shall mean interest at the rate specified for interest on investments of the EPA Hazardous Substance Superfund established by 26 U.S.C. § 9507, compounded annually on October 1 of each year, in accordance with 42 U.S.C. § 9607(a). The applicable rate of interest shall be the rate in effect at the time the interest accrues. The rate of interest is subject to change on October 1 of each year.

"The Middle Waterway Problem Area" shall mean the Middle Waterway Problem Area of the CB/NT Site. The Middle Waterway Problem Area encompasses an area approximately 3500 feet long and 300 feet wide consisting of shallow water, shoreline, and aquatic lands, including intertidal and subtidal sediments up to the top of the bank of the shoreline, located in the industrial tideflat areas of the active commercial seaport of the City of Tacoma and the areal extent of contamination and all suitable areas in very close proximity to the contamination necessary to the implementation of the Work. The Middle Waterway Problem Area is located in Tacoma, Pierce County, Washington and depicted generally on the map attached as Appendix C.

"Middle Waterway Special Account" shall mean the special account established at the Site by EPA pursuant to Section 122(b)(3) of CERCLA, 42 U.S.C. § 9622(b)(3).

"MTCA" shall mean the Model Toxics Control Act, as amended, Ch. 70.150D, Revised Code of Washington.

"MWAC" shall mean the Middle Waterway Action Committee, which at the time of entry of this Consent Decree, is comprised of Foss Maritime Company, Marine Industries Northwest, Inc., and Pioneer Industries, Inc.

"MWAC Consent Decree" shall mean the Remedial Design/Remedial Action Consent Decree entered into by MWAC and the United States that addresses financing and performing work in remedial action Areas A and B of the Middle Waterway Problem Area.

"National Contingency Plan" or "NCP" shall mean the National Oil and Hazardous Substances Pollution Contingency Plan promulgated pursuant to Section 105 of CERCLA, 42 U.S.C. § 9605, codified at 40 C.F.R. Part 300, and any amendments thereto.

"Operation and Maintenance" or "O & M" shall mean all activities required to maintain the effectiveness of the Remedial Action as required under the Operation and Maintenance Plan approved or developed by EPA pursuant to this Consent Decree and the Statement of Work (SOW).

"Paragraph" shall mean a portion of this Consent Decree identified by an arabic numeral or an upper case letter.

"Parties" shall mean the United States and the Settling Defendants.

"Past Response Costs" shall mean all costs, including, but not limited to, direct and indirect costs, that the United States paid at or in connection with the Site or at or in connection with the Commencement Bay Nearshore/Tideflats area-wide response actions attributable to the Middle Waterway Problem Area through the Effective Date of this Consent Decree, plus Interest on all such costs which has accrued pursuant to 42 U.S.C. § 9607(a) through such date.

"Performance Standards" shall mean the cleanup standards and other measures of achievement of the goals of the Remedial Action, set forth in the SOW and including achieving the cleanup objectives and performance standards provided in Section 10 of the 1989 ROD, as further

defined and described in Sections 7 and 8 of the 1989 ROD, 1997 ESD, Sections III, IV, and VI of the 2000 ESD, and Sections IV and V of the 2002 ESD, and the 2003 ESD.

"Plaintiff" shall mean the United States.

"Performing Defendant" shall mean DNR. Additionally, in the event that EPA determines, in its non-reviewable discretion, that DNR is unable or has failed to perform Work required by this Consent Decree, Performing Defendant shall also mean the City of Tacoma.

"RCRA" shall mean the Solid Waste Disposal Act, as amended, 42 U.S.C. §§ 6901 et seq. (also known as the Resource Conservation and Recovery Act).

"Record of Decision" or "ROD" shall mean (1) the EPA Record of Decision relating to the CB/NT Superfund Site signed on September 30, 1989 ("1989 ROD"), by the Regional Administrator, EPA Region, or his/her delegate, and all attachments thereto; and (2) all significant differences thereto documented in the ESD issued on July 28, 1997 ("1997 ESD"), the ESD issued on August 3, 2000 ("2000 ESD"), the ESD issued on February 4, 2002 ("2002 ESD"), and the ESD EPA issued on March 20, 2003 ("2003 ESD")(collectively the "ESDs"), which are hereby incorporated by reference. The 2003 ESD is attached as Appendix A.

"Remedial Action" shall mean those activities, except for Operation and Maintenance, to be undertaken by the Performing Defendant to implement the ROD in Area C of the Middle Waterway Problem Area, in accordance with the SOW, the Remedial Design, and the Remedial Action Work Plan and other plans approved by EPA.

"Remedial Action Work Plan" shall mean the document developed pursuant to Paragraph 12 of this Consent Decree and approved by EPA, and any amendments thereto.



"Remedial Design" shall mean those activities to be undertaken by the Performing Defendant to develop the final plans and specifications for the Remedial Action pursuant to the SOW.

"Restoration Sites" shall mean property within and adjacent to the Middle Waterway Problem Area where the City of Tacoma, Simpson, and/or others have restored or will restore estuarine marsh or other habitat pursuant to past or future consent decrees with natural resource trustees for alleged natural resource damages prior to certification of remedial action under this Consent Decree or the MWAC Consent Decree.

"Section" shall mean a portion of this Consent Decree identified by a roman numeral.

"Settling Defendants" shall mean the Funding Defendants and DNR.

"Simpson" shall mean for the purposes of this Consent Decree only Simpson Tacoma Kraft Company, LLC and Simpson Tacoma Land Company.

"Site" shall mean Area C of the Middle Waterway Way Problem Area of the Commencement Bay Nearshore/Tideflats Superfund Site, and the areal extent of contamination and all suitable areas in very close proximity to the contamination necessary to the implementation of the Work. The Site is located in Tacoma, Pierce County, Washington and depicted generally on the map attached as Appendix C.

"State" shall mean the State of Washington.

"Statement of Work" or "SOW" shall mean the statement of work for implementation of Remedial Design and Remedial Action, and Operation and Maintenance at the Site, as set forth in Appendix B to this Consent Decree and any modifications made in accordance with this Consent Decree.

"State-owned aquatic lands" or "SOAL" shall mean all state-owned tidelands, shorelands, harbor areas, and the beds of navigable waters managed by DNR pursuant to chapter 79.90 RCW.

"Supervising Contractor" shall mean the principal contractor retained by the Performing Defendant to supervise and direct the implementation of the Work under this Consent Decree.

"United States" shall mean the United States of America.

"Waste Material" shall mean (1) any "hazardous substance" under Section 101(14) of CERCLA, 42 U.S.C. § 9601(14); (2) any pollutant or contaminant under Section 101(33), 42 U.S.C. § 9601(33); (3) any "solid waste" under Section 1004(27) of RCRA, 42 U.S.C. § 6903(27); and (4) any "hazardous material" under the Model Toxics Substances Control Act, RCW 71.05.D.

"Work" shall mean all activities Settling Defendants are required to perform under this Consent Decree, except those required by Section XXV (Retention of Records).

## **V. GENERAL PROVISIONS**

5. **Objectives of the Parties.** The objectives of the Parties in entering into this Consent Decree are to protect public health or welfare or the environment at the Site by the design and implementation of response actions at the Site by the Settling Defendants, to reimburse response costs of the Plaintiff, and to resolve the claims of Plaintiff, including claims for Past Response Costs, against Settling Defendants as provided in this Consent Decree.

6. **Commitments by Settling Defendants.**

1. Settling Defendants shall finance and perform the Work in accordance with this Consent Decree, the ROD, the SOW, and all work plans and other plans, standards, specifications, and schedules set forth herein or developed by Performing Defendant and approved by EPA pursuant to this Consent Decree. The Performing Defendant shall also reimburse the

United States for Future Response Costs and certain Future Oversight Costs as provided in this Consent Decree.

2. Except as noted in this Consent Decree, the obligations of DNR and the City to finance and perform the Work and to pay amounts owed the United States under this Consent Decree are joint and several. In the event of the insolvency or other failure of either DNR or the City to implement the requirements of this Consent Decree, the other shall complete all such requirements.

7. Compliance With Applicable Law. All activities undertaken by Settling Defendants pursuant to this Consent Decree shall be performed in accordance with the requirements of all applicable federal and state laws and regulations. Performing Defendant must also comply with all applicable or relevant and appropriate requirements of all Federal and state environmental laws as set forth in the ROD and the SOW. The activities conducted pursuant to this Consent Decree, if approved by EPA, shall be considered to be consistent with the NCP.

8. Permits.

1. As provided in Section 121(e) of CERCLA and Section 300.400(e) of the NCP, no permit shall be required for any portion of the Work conducted entirely within the CB/NT Superfund Site. Where any portion of the Work that is not within the CB/NT Superfund Site requires a federal or state permit or approval, the Performing Defendant shall submit timely and complete applications and take all other actions necessary to obtain all such permits or approvals.

2. The Performing Defendant may seek relief under the provisions of Section XVIII (Force Majeure) of this Consent Decree for any delay in the performance of the Work resulting from a failure to obtain, or a delay in obtaining, any permit required for the Work.

3. This Consent Decree is not, and shall not be construed to be, a permit issued pursuant to any federal or state statute or regulation.

9. Notice to Successors-in-Title.

1. With respect to any property owned or controlled by the Settling Defendant(s) that is located within or along the shoreline of the Middle Waterway Problem Area (Settling Defendants other than Western Machine Works), within 30 days after the entry of this Consent Decree, the Settling Defendant(s) shall submit to EPA for review and approval a notice to be filed with the Recorder's Office or Registry of Deeds or other appropriate office, Pierce County, State of Washington, which shall provide notice to all successors-in-title that the property is part of the Site, that EPA selected a remedy for the Site on September 30, 1989, and that potentially responsible parties have entered into a Consent Decree requiring implementation of the remedy. Such notice(s) shall identify the United States District Court in which the Consent Decree was filed, the name and civil action number of this case, and the date the Consent Decree was entered by the Court. The Settling Defendant(s) shall record the notice(s) within 10 days of EPA's approval of the notice(s). The Settling Defendant(s) shall provide EPA with a certified copy of the recorded notice(s) within 10 days of recording such notice(s).

2. At least 30 days prior to the conveyance of any interest in property located within the Middle Waterway Problem Area including, but not limited to, fee interests, leasehold interests, and mortgage interests, the Settling Defendant(s) conveying the interest shall give the grantee written notice of (i) this Consent Decree, (ii) any instrument by which an interest in real property has been conveyed that confers a right of access, and (iii) any recorded restrictive covenant authorized pursuant to Washington RCW 70.105D.030(1)(f) and (g), and more

specifically described in Washington Administrative Code (WAC) 173-340-440(9)(G), that places use restrictions on and concerning the real property pursuant to Section IX (Access and Institutional Controls). At least 30 days prior to such conveyance, the Settling Defendant(s) conveying the interest shall also give written notice to EPA and the State of the proposed conveyance, including the name and address of the grantee, and the date on which notice of the Consent Decree, access easements, and/or restrictive easements was given to the grantee.

3. In the event of any such conveyance, the Settling Defendant's obligations under this Consent Decree, including, but not limited to, its obligation to provide or secure access and institutional controls, as well as to abide by such institutional controls, pursuant to Section IX (Access and Institutional Controls) of this Consent Decree, shall continue to be met by the Settling Defendant(s). In no event shall the conveyance release or otherwise affect the liability of the Settling Defendant(s) to comply with all provisions of this Consent Decree, absent the prior written consent of EPA. If the United States approves, the grantee may perform some or all of the Work under this Consent Decree.

#### **VI. PERFORMANCE OF THE WORK BY PERFORMING DEFENDANT**

##### **10. Selection of Supervising Contractor and Construction Contractor.**

1. All aspects of the Work to be performed by Performing Defendant pursuant to Sections VI (Performance of the Work by Performing Defendant), VII (Remedy Review), VIII (Quality Assurance, Sampling and Data Analysis), and XV (Emergency Response) of this Consent Decree shall be under the direction and supervision of a Supervising Contractor and a Construction Contractor, the selection of which shall be subject to disapproval by EPA. Within ten (10) days

after the lodging of this Consent Decree, Performing Defendant shall notify EPA in writing of the detailed process, selection criteria, and schedule for selecting the proposed Supervising Contractor.

2. Supervising Contractor Selection Process. Within twenty (20) days of lodging the Consent Decree, Performing Defendant shall notice the Request For Proposals ("RFP") to obtain a Supervising Contractor. Within ninety (90) days of the advertisement, Performing Defendant shall notify EPA in writing of its proposed Supervising Contractor. Performing Defendant shall demonstrate that the proposed Supervising Contractor has a quality system that complies with ANSI/SQC E4-1994, "Specifications and Guidelines for Quality Systems for Environmental Data Collection and Environmental Technology Programs," (American National Standard, January 5, 1995), by submitting a copy of the proposed Supervising Contractor's Quality Management Plan (QMP). The QMP should be prepared in accordance with "EPA Requirements for Quality Management Plans (QA/R-2)" (EPA/240/B-01/002, March 2001) or equivalent documentation as determined by EPA. Upon review of the proposed Supervising Contractor, EPA will issue a notice of disapproval or an authorization to proceed. If at any time thereafter, Performing Defendant proposes to change the Supervising Contractor, Performing Defendant shall give fifteen (15) days notice to EPA and must obtain an authorization to proceed from EPA before the new Consultant performs, directs, or supervises any Work under this Consent Decree.

3. Construction Contractor Selection Process. Within twenty (20) days of lodging the Consent Decree or EPA approval of the Final Remedial Design submittal, whichever is later, Performing Defendant shall notice the request for proposals ("RFP") to obtain a Contractor. Within ninety (90) days of the advertisement, Performing Defendant shall notify EPA in writing of its proposed Construction Contractor. Performing Defendant shall demonstrate that the proposed

Construction Contractor has a quality system that complies with ANSI/SQC E4-1994, "Specifications and Guidelines for Quality Systems for Environmental Data Collection and Environmental Technology Programs," (American National Standard, January 5, 1995), by submitting a copy of the proposed contractor's Quality Management Plan (QMP). The QMP should be prepared in accordance with "EPA Requirements for Quality Management Plans (QA/R-2)" (EPA/240/B-01/002, March 2001) or equivalent documentation as determined by EPA. Upon review of the proposed Construction Contractor, EPA will issue a notice of disapproval or an authorization to proceed. If at any time thereafter, Performing Defendant proposes to change the Construction Contractor, Performing Defendant shall give fifteen (15) days notice to EPA and must obtain an authorization to proceed from EPA before the new Construction Contractor performs, directs, or supervises any Work under this Consent Decree.

4. If EPA disapproves a proposed Supervising or Construction Contractor, EPA will notify Performing Defendant in writing. Performing Defendant shall submit to EPA a list of contractors, including the qualifications of each contractor, that would be acceptable to them within 30 days of receipt of EPA's disapproval of the contractor previously proposed. EPA will provide written notice of the names of any contractor(s) that it disapproves and an authorization to proceed with respect to any of the other contractors. Performing Defendant may select any contractor from that list that is not disapproved and shall notify EPA of the name of the contractor selected within twenty-one (21) days of EPA's authorization to proceed.

5. If EPA fails to provide written notice of its authorization to proceed or disapproval as provided in this Paragraph and this failure prevents the Performing Defendant from meeting one or more deadlines in a plan approved by the EPA pursuant to this Consent Decree,

Performing Defendant may seek relief under the provisions of Section XVIII (Force Majeure) hereof.

11. Remedial Design

1. No later than thirty (30) days after the Effective Date, Performing Defendant shall submit to EPA and the State a Preliminary Remedial Design and a Health and Safety Plan for field design activities, if applicable, which conforms to the applicable Occupational Safety and Health Administration and EPA requirements including, but not limited to, 29 C.F.R. section 1910.120. The Preliminary Remedial Design shall include, at a minimum, the following: (1) design criteria; (2) results of treatability studies; if any; (3) results of additional field sampling and pre-design work; (4) project delivery strategy; (5) preliminary plans, drawings and sketches; (6) required specifications in outline form; and (7) preliminary construction schedule. Upon approval by EPA, both the Preliminary Remedial Design and the Health and Safety Plan shall be incorporated into and become enforceable under this Consent Decree.

2. Within forty-five (45) days after approval of the Preliminary Remedial Design, the Performing Defendant shall submit to EPA and the State a Pre-Final Remedial Design. The Pre-Final Remedial Design submittal shall include at a minimum the following: (1) final plans and specifications; (2) Operation, Maintenance and Monitoring Plan ("OMMP"); Construction Quality Assurance Project Plan ("CQAPP"); (4) Field Sampling Plan (directed at measuring progress towards meeting Performance Standards; and (5) Contingency Plan. The CQAP shall detail the approach to quality assurance during construction activities at the Site.

3. Within thirty (30) days after approval of the Pre-Final Remedial Design, the Performing Defendant shall submit to EPA and the State the Final Remedial Design.



12. Remedial Action

1. Within 30 days after EPA approval of the Final Remedial Design, Performing Defendant shall submit to EPA and the State, a work plan for the performance of the Remedial Action at the Site ("Remedial Action Work Plan"). The Remedial Action Work Plan shall provide for construction and implementation of the remedy set forth in the ROD and achievement of the Performance Standards, in accordance with this Consent Decree, the ROD, the SOW, and the design plans and specifications developed in accordance with the Remedial Design and approved by EPA. Upon its approval by EPA, the Remedial Action Work Plan shall be incorporated into and become enforceable under this Consent Decree. At the same time as it submits the Remedial Action Work Plan, Performing Defendant shall submit to EPA and the State a Health and Safety Plan for field activities required by the Remedial Action Work Plan which conforms to the applicable Occupational Safety and Health Administration and EPA requirements including, but not limited to, 29 C.F.R. § 1910.120.

2. The Remedial Action Work Plan shall include the following: (1) the schedule for completion of the Remedial Action; (2) method for selection of the contractor; (3) schedule for developing and submitting other required Remedial Action plans; (4) Final Construction Quality Assurance Plan; (5) final construction water quality monitoring plan; (6) methods for satisfying permitting requirements; (7) methodology for implementation of the Operation and Maintenance Plan; (8) tentative formulation of the Remedial Action team; (9) construction quality control plan (by constructor); and (10) procedures and plans for the decontamination of equipment and the disposal of contaminated materials. The Remedial Action Work Plan also shall include a schedule for implementation of all Remedial Action tasks identified

in the Remedial Design and SOW and shall identify the initial formulation of the Performing Defendant's Remedial Action Project Team (including, but not limited to, the Supervising Contractor).

3. Upon approval of the Remedial Action Work Plan by EPA, after a reasonable opportunity for review and comment by the State, Performing Defendant shall implement the activities required under the Remedial Action Work Plan. The Performing Defendant shall submit to EPA and the State all plans, submittals, or other deliverables required under the approved Remedial Action Work Plan in accordance with the approved schedule for review and approval pursuant to Section XI (EPA Approval of Plans and Other Submissions). Unless otherwise directed by EPA, Performing Defendant shall not commence physical Remedial Action activities at the Site prior to approval of the Remedial Action Work Plan.

13. The Performing Defendant shall continue to implement the Remedial Action and O&M until the Performance Standards are achieved and for so long thereafter as is otherwise required under this Consent Decree.

14. Modification of the SOW or Related Work Plans.

1. If EPA determines that modification to the work specified in the SOW and/or in work plans developed pursuant to the SOW is necessary to achieve and maintain the Performance Standards or to carry out and maintain the effectiveness of the remedy set forth in the ROD, EPA may require that such modification be incorporated in the SOW and/or such work plans. Provided, however, that a modification may only be required pursuant to this Paragraph to the extent that it is consistent with the scope of the remedy selected in the ROD.

2. For the purposes of this Paragraph 14 and Paragraph 52 and 53 only, the "scope of the remedy selected in the ROD" shall mean remediation of contaminated marine sediment in the Site by implementing the following key elements: site use restrictions, natural recovery, enhanced natural recovery, sediment remedial action, and monitoring. These key elements are more fully described in Section 10 of the September 30, 1989 ROD, and include achieving the cleanup objectives and performance standards provided in Section 10 of the ROD, as further defined and described in Sections 7 and 8 of the 1989 ROD, the 1997 ESD, Sections III, IV, and VI of the 2000 ESD, Sections IV and V of the 2002 ESD, and the 2003 ESD that provides for excavation and removal of subsurface contaminated sediment.

3. If Performing Defendant objects to any modification determined by EPA to be necessary pursuant to this Paragraph, it may seek dispute resolution pursuant to Section XIX (Dispute Resolution), Paragraph 70 (record review). The SOW and/or related work plans shall be modified in accordance with final resolution of the dispute.

4. Performing Defendant shall implement any work required by any modifications incorporated in the SOW and/or in work plans developed pursuant to the SOW in accordance with this Paragraph.

5. Nothing in this Paragraph shall be construed to limit EPA's authority to require performance of further response actions as otherwise provided in this Consent Decree.

15. Performing Defendant acknowledges and agrees that nothing in this Consent Decree, the SOW, or the Remedial Design or Remedial Action Work Plans constitutes a warranty or representation of any kind by Plaintiff that compliance with the work requirements set forth in the SOW and the Work Plans will achieve the Performance Standards.

16. 1. Performing Defendant shall, prior to any off-Site shipment of Waste Material from the Site to an out-of-state waste management facility, provide written notification to the appropriate state environmental official in the receiving facility's state and to the EPA Project Coordinator of such shipment of Waste Material. However, this notification requirement shall not apply to any off-Site shipments when the total volume of all such shipments will not exceed 10 cubic yards.

(1) The Performing Defendant shall include in the written notification the following information, where available: (1) the name and location of the facility to which the Waste Material is to be shipped; (2) the type and quantity of the Waste Material to be shipped; (3) the expected schedule for the shipment of the Waste Material; and (4) the method of transportation. The Performing Defendant shall notify the state in which the planned receiving facility is located of major changes in the shipment plan, such as a decision to ship the Waste Material to another facility within the same state, or to a facility in another state.

(2) The identity of the receiving facility and state will be determined by the Performing Defendant following the award of the contract for Remedial Action construction. The Performing Defendant shall provide the information required by Paragraph 16.1 as soon as practicable after the award of the contract and before the Waste Material is actually shipped.

2. Before shipping any hazardous substances, pollutants, or contaminants from the Site to an off-site location, Performing Defendant shall obtain EPA's certification that the proposed receiving facility is operating in compliance with the requirements of CERCLA Section 121(d)(3) and 40 C.F.R. 300.440. Performing Defendant shall only send hazardous substances,

pollutants, or contaminants from the Site to an off-site facility that complies with the requirements of the statutory provision and regulations cited in the preceding sentence.

## **VII. REMEDY REVIEW**

17. **Periodic Review.** Performing Defendant shall conduct any studies and investigations as requested by EPA, in order to permit EPA to conduct reviews of whether the Remedial Action is protective of human health and the environment at least every five years as required by Section 121(c) of CERCLA and any applicable regulations.

18. **EPA Selection of Further Response Actions.** If EPA determines, at any time, that the Remedial Action is not protective of human health and the environment, EPA may select further response actions for the Site in accordance with the requirements of CERCLA and the NCP.

19. **Opportunity To Comment.** Performing Defendant and, if required by Sections 113(k)(2) or 117 of CERCLA, the public, will be provided with an opportunity to comment on any further response actions proposed by EPA as a result of the review conducted pursuant to Section 121(c) of CERCLA and to submit written comments for the record during the comment period.

20. **Performing Defendant's Obligation To Perform Further Response Actions.** If EPA selects further response actions for the Site, the Performing Defendant shall undertake such further response actions to the extent that the re-opener conditions in Paragraph 86 or Paragraph 87 (United States' reservations of liability based on unknown conditions or new information) are satisfied. Performing Defendant may invoke the procedures set forth in Section XIX (Dispute Resolution) to dispute (1) EPA's determination that the reopener conditions of Paragraph 86 or Paragraph 87 of Section XXI (Covenants Not To Sue by Plaintiff) are satisfied, (2) EPA's

determination that the Remedial Action is not protective of human health and the environment, or (3) EPA's selection of the further response actions. Disputes pertaining to the whether the Remedial Action is protective or to EPA's selection of further response actions shall be resolved pursuant to Paragraph 70 (record review).

21. Submissions of Plans. If Performing Defendant is required to perform the further response actions pursuant to Paragraph 20, it shall submit a plan for such work to EPA for approval in accordance with the procedures set forth in Section VI (Performance of the Work by Performing Defendant) and shall implement the plan approved by EPA in accordance with the provisions of this Decree.

#### **VIII. QUALITY ASSURANCE, SAMPLING, AND DATA ANALYSIS**

22. Performing Defendant shall use quality assurance, quality control, and chain of custody procedures for all treatability, design, compliance and monitoring samples in accordance with "EPA Requirements for Quality Assurance Project Plans (QA/R5)" (EPA/240/B-01/003, March 2001), "Guidance for Quality Assurance Project Plans (QA/G-5)" (EPA/600/R-98/018, February 1998), and subsequent amendments to such guidelines upon notification by EPA to Performing Defendant of such amendment. Amended guidelines shall apply only to procedures conducted after such notification. Prior to the commencement of any monitoring project under this Consent Decree, Performing Defendant shall submit to EPA for approval, after a reasonable opportunity for review and comment by the State, a Quality Assurance Project Plan ("QAPP") that is consistent with the SOW, and the NCP. If relevant to the proceeding, the Parties agree that validated sampling data generated in accordance with the QAPP(s) and reviewed and approved by EPA shall be admissible as evidence, without objection, in any proceeding under this Decree.

Performing Defendant shall ensure that EPA personnel and its authorized representatives are allowed access at reasonable times to all laboratories utilized by Performing Defendant in implementing this Consent Decree. In addition, Performing Defendant shall ensure that such laboratories shall analyze all samples submitted by EPA pursuant to the QAPP for quality assurance monitoring. Performing Defendant shall ensure that the laboratories it utilizes for the analysis of samples taken pursuant to this Decree perform all analyses according to accepted EPA methods. Accepted EPA methods consist of those methods which are documented in the "Contract Lab Program Statement of Work for Inorganic Analysis" and the "Contract Lab Program Statement of Work for Organic Analysis," dated February 1988, and any amendments made thereto during the course of the implementation of this Decree; however, upon approval by EPA, after opportunity for review and comment by the State, the Performing Defendant may use other analytical methods which are as stringent as or more stringent than the CLP- approved methods. Performing Defendant shall ensure that all laboratories it uses for analysis of samples taken pursuant to this Consent Decree participate in an EPA or EPA-equivalent QA/QC program. Performing Defendant shall only use laboratories that have a documented Quality System which complies with ANSI/ASQC E4-1994, "Specifications and Guidelines for Quality Systems for Environmental Data Collection and Environmental Technology Programs," (American National Standard, January 5, 1995), and "EPA Requirements for Quality Management Plans (QA/R-2)," (EPA/240/B-01/002, March 2001) or equivalent documentation as determined by EPA. EPA may consider laboratories accredited under the National Environmental Laboratory Accreditation Program (NELAP) as meeting the Quality System requirements. Performing Defendant shall ensure that all field

methodologies utilized in collecting samples for subsequent analysis pursuant to this Decree will be conducted in accordance with the procedures set forth in the QAPP approved by EPA.

23. Upon request, the Performing Defendant shall allow split or duplicate samples to be taken by EPA or its authorized representatives. Performing Defendant shall notify EPA not less than 28 days in advance of any sample collection activity unless shorter notice is agreed to by EPA. In addition, EPA shall have the right to take any additional samples that EPA deems necessary. Upon request, EPA shall allow the Performing Defendant to take split or duplicate samples of any samples it takes as part of the Plaintiff's oversight of the Performing Defendant's implementation of the Work.

24. Performing Defendant shall submit to EPA four (4) copies of the results of all sampling and/or tests or other data obtained or generated by or on behalf of Performing Defendant with respect to the Site and/or the implementation of this Consent Decree unless EPA agrees otherwise.

25. Notwithstanding any provision of this Consent Decree, the United States hereby retains all of its information gathering and inspection authorities and rights, including enforcement actions related thereto, under CERCLA, RCRA and any other applicable statutes or regulations.

#### **IX. ACCESS AND INSTITUTIONAL CONTROLS**

26. If the Middle Waterway Problem Area, a portion thereof, or any other property where access and/or land/water use restrictions are needed to implement this Consent Decree, is owned or controlled by any of the Settling Defendants, such Settling Defendants shall:

1. commencing on the date of lodging of this Consent Decree and subject to the provisions of Paragraph 27, provide the Performing Defendant and the settling defendants



performing remedial activities under the MWAC Consent Decree and their contractors with access at all reasonable times to property owned or controlled by any of the Settling Defendants within the Middle Waterway Problem Area for the purpose of conducting remedial activities, including operations, maintenance or monitoring activities, conducted under the MWAC Consent Decree or this Consent Decree; and commencing on the date of lodging of this Consent Decree, provide the United States and its representatives, including EPA and its contractors, with access at all reasonable times to the Middle Waterway Problem Area, or such other property, for the purpose of conducting any activity related to this Consent Decree including, but not limited to, the following activities:

- (1) Monitoring the Work, including remedial action and operation and maintenance of remedial actions performed in Areas A, B and C of the Middle Waterway Problem Area;
- (2) Verifying any data or information submitted to the United States pursuant to this Consent Decree or the MWAC Consent Decree;
- (3) Conducting investigations relating to contamination at or near the Middle Waterway Problem Area;
- (4) Obtaining samples;
- (5) Assessing the need for, planning, or implementing additional response actions at or near the Middle Waterway Problem Area;
- (6) Implementing the Work, including remedial action and operation and maintenance of remedial actions performed in Areas A, B and C of the Middle Waterway Problem Area, pursuant to the conditions set forth in Paragraph 90 of this Consent Decree;

(7) Inspecting and copying records, operating logs, contracts, or other documents maintained or generated by Settling Defendants or their agents, consistent with Section XXIV (Access to Information);

(8) Assessing Settling Defendants' compliance with this Consent Decree; and

(9) Determining whether the Middle Waterway Problem Area or other property is being used in a manner that is prohibited or restricted, or that may need to be prohibited or restricted, by or pursuant to this Consent Decree;

2. commencing on the date of lodging of this Consent Decree, refrain from using the Middle Waterway Problem Area or such other property, in any manner that would interfere with or adversely affect the implementation, integrity or protectiveness of the remedial measures to be performed pursuant to this Consent Decree or the MWAC Consent Decree. Such restrictions include, but are not limited to (1) reducing potential exposure of marine organisms to contaminated sediments disposed of and or confined by capping, and (2) reducing potential exposure to marine organisms to contaminated sediments left in place in the Middle Waterway; and

3. at EPA's request execute and record in the Auditor's Office of Pierce County, State of Washington, a restrictive covenant authorized by MTCA and that complies with the form and content contained in WAC 173-340-440 that (i) grants a right of access for the purpose of conducting any activity related to this Consent Decree including, but not limited to, those activities listed in Paragraph 26.1 of this Consent Decree, and (ii) grants the right to enforce the land/water use restrictions listed in Paragraph 26.2 of this Consent Decree, or other restrictions,

including any that may be required by WAC 173-340-440, that EPA determines are necessary to implement, ensure non-interference with, or ensure the protectiveness of the remedial measures to be performed pursuant to this Consent Decree. Such Settling Defendants shall grant the access rights and the rights to enforce the land/water use restrictions to (i) the United States, on behalf of EPA, and its representatives, (ii) the State and its representatives, (iii) the other Settling Defendants and their representatives, and/or (iv) other appropriate grantees. Such Settling Defendants shall, within 45 days of EPA's request, submit to EPA for review and approval with respect to such property a draft of such MTCA restrictive covenant.

Within 15 days of EPA's approval and acceptance of such MTCA restrictive covenant, Settling Defendants shall execute and record in the Auditor's Office of Pierce County, State of Washington, the EPA approved MTCA restrictive covenant. EPA anticipates that such a restrictive covenant might only be necessary in the Middle Waterway Problem Area where Waste Materials are capped in place as part of remedial action undertaken pursuant to this Consent Decree or the MWAC Consent Decree.

27. EPA and Settling Defendants acknowledge that some or all of the properties affected by this Section include businesses and governmental operations. EPA and Settling Defendants acknowledge that the right of access provided by this Section should be exercised at reasonable times for a reasonable duration and in a way that minimizes interference with the operation of those operations to the extent practicable. Because of salmonid and bull trout listings under the Endangered Species Act, Remedial Action may need to occur during day and/or night. Performing Defendant or its representatives shall use best efforts to provide five (5) working days' notice to the Settling Defendant(s) affected by this Section, and to coordinate Remedial Action

with ongoing operations and other remedial actions occurring within the Middle Waterway Problem Area or an adjacent Waterway, but lack of notice shall not alter in any way such Settling Defendant's(') obligation to provide access under this Section. A Settling Defendant shall not be required to provide MWAC or its contractor access for staging remedial action in Areas A and B of the Middle Waterway Problem Area unless MWAC has in good faith attempted to coordinate with such Settling Defendant. If access or easements to properties owned or controlled by the settling defendants to the MWAC Consent Decree are required to implement the Remedial Action, the Performing Defendant shall not be required to pay money in consideration for such access or easements.

28. If the Site, or any other property where access and/or land/water use restrictions are needed to implement this Consent Decree, is owned or controlled by persons other than any of the Settling Defendants or MWAC, Performing Defendant shall use best efforts to secure from such persons:

1. an agreement to provide access thereto for Performing Defendant, as well as for the United States on behalf of EPA, and the State, as well as their representatives (including contractors), for the purpose of conducting any activity related to this Consent Decree including, but not limited to, those activities listed in Paragraph 26.1 of this Consent Decree;

2. an agreement, enforceable by the Performing Defendant and the United States, to refrain from using the Site, or such other property, in any manner that would interfere with or adversely affect the implementation, integrity, or protectiveness of the remedial measures to be performed pursuant to this Consent Decree. Such restrictions include, but are not limited to restrictions established by Paragraph 26.2 of this Consent Decree; and

3. Within forty-five (45) days of EPA's request, Performing Defendant shall submit to EPA for approval a restrictive covenant authorized by MTCA and that complies with the form and content contained in WAC 173-340-440 that (i) grants a right of access for the purpose of conducting any activity related to this Consent Decree including, but not limited to, those activities listed in Paragraph 26.1 of this Consent Decree, and (ii) grants the right to enforce the land/water use restrictions listed in Paragraph 26.2 of this Consent Decree, or other restrictions, including any that may be required by WAC 173-340-440, that EPA determines are necessary to implement, ensure non-interference with, or ensure the protectiveness of the remedial measures to be performed pursuant to this Consent Decree. Such Performing Defendant shall grant the access rights and the rights to enforce the land/water use restrictions to (i) the United States, on behalf of EPA, and its representatives, (ii) the State and its representatives, (iii) the Performing Defendant and its representatives, and/or (iv) other appropriate grantees. Performing Defendant shall, within 45 days of EPA's request of entry of this Consent Decree, submit to EPA for review and approval with respect to such property a draft of such MTCA restrictive covenant.

Within 15 days of EPA's approval and acceptance of the draft MTCA restrictive covenant, Performing Defendant shall execute and record in the Auditor's Office of Pierce County, State of Washington, the EPA approved MTCA restrictive covenant.

29. For purposes of Paragraphs 27 and 28 of this Consent Decree, "best efforts" includes the payment of reasonable sums of money in consideration of access, access easements, land/water use restrictions, and/or restrictive covenants, and/or an agreement to release or subordinate a prior lien or encumbrance. If (a) any access or land/water use restriction agreements required by Paragraphs 28.1 or 28.2 of this Consent Decree are not obtained within 45 days of the

date of entry of this Consent Decree, or (b) any access easements or restrictive covenants required by Paragraphs 28.3 of this Consent Decree by the date and as required by this Consent Decree, Performing Defendant shall promptly notify the United States in writing, and shall include in that notification a summary of the steps that Performing Defendant has taken to attempt to comply with Paragraph 28 of this Consent Decree. The United States may, as it deems appropriate, assist Performing Defendant in obtaining access or land/water use restrictions, either in the form of contractual agreements or in the form of easements running with the land, or in obtaining the release or subordination of a prior lien or encumbrance. Performing Defendant shall reimburse the United States in accordance with the procedures in Section XVI (Payments for Response Costs), for all costs incurred, direct or indirect, by the United States in obtaining such access and/or land/water use restrictions including, but not limited to, the cost of attorney time and the amount of monetary consideration paid or just compensation.

30. Performing Defendant may seek relief under the provisions of Section XVIII (Force Majeure) of this Consent Decree for any delay in the performance of Work resulting from failure to obtain, or a delay in obtaining, any access required for the Work provided the Performing Defendant has met its requirements under this Section.

31. If EPA determines that land/water use restrictions in the form of state or local laws, regulations, ordinances or other governmental controls are needed to implement the remedy selected in the ROD, ensure the integrity and protectiveness thereof, or ensure non-interference therewith, Settling Defendants shall cooperate with EPA's efforts to secure such governmental controls.

32. Notwithstanding any provision of this Consent Decree, the United States retains all of its access authorities and rights, as well as all of its rights to require land/water use restrictions, including enforcement authorities related thereto, under CERCLA, RCRA and any other applicable statute or regulations.

#### **X. REPORTING REQUIREMENTS**

33. In addition to any other requirement of this Consent Decree, Performing Defendant shall submit to EPA and the State four (4) copies of written monthly progress reports that:

(a) describe the actions which have been taken toward achieving compliance with this Consent Decree during the previous month; (b) include a summary of all results of sampling and tests and all other data received or generated by Performing Defendant or its contractors or agents in the previous month; (c) identify all work plans, plans and other deliverables required by this Consent Decree completed and submitted during the previous month; (d) describe all actions, including, but not limited to, data collection and implementation of work plans, which are scheduled for the next six weeks and provide other information relating to the progress of construction, including, but not limited to, critical path diagrams, Gantt charts and Pert charts; (e) include information regarding percentage of completion, unresolved delays encountered or anticipated that may affect the future schedule for implementation of the Work, and a description of efforts made to mitigate those delays or anticipated delays; (f) include any modifications to the work plans or other schedules that Performing Defendant has proposed to EPA or that have been approved by EPA; and (g) describe all activities undertaken in support of the EPA Community Relations Plan during the previous month and those to be undertaken in the next six weeks. Performing Defendant shall submit these progress reports to EPA and the State by the tenth day of every month following the lodging of this

Consent Decree until EPA notifies the Performing Defendant pursuant to Paragraph 53.2 of Section XIV (Certification of Completion). If requested by EPA , Performing Defendant shall also provide briefings for EPA to discuss the progress of the Work.

34. The Performing Defendant shall notify EPA of any change in the schedule described in the monthly progress report for the performance of any activity, including, but not limited to, data collection and implementation of work plans, no later than seven days prior to the performance of the activity.

35. Upon the occurrence of any event during performance of the Work that Performing Defendant is required to report pursuant to Section 103 of CERCLA or Section 304 of the Emergency Planning and Community Right-to-know Act (EPCRA), Performing Defendant shall within 24 hours of the onset of such event orally notify the EPA Project Coordinator or the Alternate EPA Project Coordinator (in the event of the unavailability of the EPA Project Coordinator), or, in the event that neither the EPA Project Coordinator or Alternate EPA Project Coordinator is available, the Emergency Response Section, Region 10, United States Environmental Protection Agency at its current number, (206) 553-1263, or its phone number at the date of such release. These reporting requirements are in addition to the reporting required by CERCLA Section 103 or EPCRA Section 304.

36. Within 20 days of the onset of such an event, Performing Defendant, shall furnish to Plaintiff a written report, signed by Performing Defendant's Project Coordinator, setting forth the events which occurred and the measures taken, and to be taken, in response thereto. Within 30 days of the conclusion of such an event, Performing Defendant shall submit a report setting forth all actions taken in response thereto.



37. Performing Defendant shall submit four (4) copies of all plans, reports, and data required by the SOW, the Remedial Action Work Plan, or any other approved plans to EPA in accordance with the schedules set forth in such plans. Performing Defendant shall simultaneously submit 1 copy of all such plans, reports and data to the State and one copy to the National Oceanic and Atmospheric Administration on behalf of the Natural Resource Trustees. Upon request by EPA, Settling Defendants shall submit in electronic form all portions of any report or other deliverable Settling Defendants are required to submit pursuant to the provisions of this Consent Decree.

38. All reports and other documents submitted by Performing Defendant to EPA (other than the monthly progress reports referred to above) which purport to document Performing Defendant's compliance with the terms of this Consent Decree shall be signed by an authorized representative of the Performing Defendant.

#### **XI. EPA APPROVAL OF PLANS AND OTHER SUBMISSIONS**

39. After review of any plan, report or other item which is required to be submitted for approval pursuant to this Consent Decree, EPA, after reasonable opportunity for review and comment by the State, shall: (a) approve, in whole or in part, the submission; (b) approve the submission upon specified conditions; (c) modify the submission to cure the deficiencies; (d) disapprove, in whole or in part, the submission, directing that the Settling Defendants modify the submission; or (e) any combination of the above. However, EPA shall not modify a submission without first providing Settling Defendants at least one notice of deficiency and an opportunity to cure within 30 days, except where to do so would cause serious disruption to the Work or where previous submission(s) have been disapproved due to material defects and the

deficiencies in the submission under consideration indicate a bad faith lack of effort to submit an acceptable deliverable.

40. In the event of approval, approval upon conditions, or modification by EPA, pursuant to Paragraph 39(a), (b), or (c), Settling Defendants shall proceed to take any action required by the plan, report, or other item, as approved or modified by EPA subject only to their right to invoke the Dispute Resolution procedures set forth in Section XIX (Dispute Resolution) with respect to the modifications or conditions made by EPA. In the event that EPA modifies the submission to cure the deficiencies pursuant to Paragraph 39(c) and the submission has a material defect, EPA retains its right to seek stipulated penalties, as provided in Section XX (Stipulated Penalties). Performing Defendant may invoke the Dispute Resolution procedures set forth in Section XIX (Dispute Resolution) with respect to EPA's determination that the submission has a material defect or deficiency.

41. Resubmission of Plans.

1. Upon receipt of a notice of disapproval pursuant to Paragraph 39(d), Settling Defendants shall, within 21 days or such longer time as specified by EPA in such notice, correct the deficiencies and resubmit the plan, report, or other item for approval. Any stipulated penalties applicable to the submission, as provided in Section XX, shall accrue during the 21 day period or otherwise specified period but shall not be payable unless the resubmission is disapproved or modified due to a material defect as provided in Paragraphs 42 and 43.

2. Notwithstanding the receipt of a notice of disapproval pursuant to Paragraph 39(d), Settling Defendants shall proceed, at the direction of EPA, to take any action required by any non-deficient portion of the submission. Implementation of any non-deficient

portion of a submission shall not relieve Performing Defendant of any liability for stipulated penalties under Section XX (Stipulated Penalties).

42. In the event that a resubmitted plan, report or other item, or portion thereof, is disapproved by EPA, EPA may again require the Settling Defendants to correct the deficiencies, in accordance with the preceding Paragraphs. EPA also retains the right to modify or develop the plan, report or other item. Settling Defendants shall implement any such plan, report, or item as modified or developed by EPA, subject only to their right to invoke the procedures set forth in Section XIX (Dispute Resolution).

43. If upon resubmission, a plan, report, or item is disapproved or modified by EPA due to a material defect, Settling Defendants shall be deemed to have failed to submit such plan, report, or item timely and adequately unless the Settling Defendants invoke the dispute resolution procedures set forth in Section XIX (Dispute Resolution) and EPA's action is overturned pursuant to that Section. The provisions of Section XIX (Dispute Resolution) and Section XX (Stipulated Penalties) shall govern the implementation of the Work and accrual and payment of any stipulated penalties during Dispute Resolution. If EPA's disapproval or modification is upheld, stipulated penalties shall accrue for such violation as provided in Section XX.

44. All plans, reports, and other items required to be submitted to EPA under this Consent Decree shall, upon approval or modification by EPA, be enforceable under this Consent Decree. In the event EPA approves or modifies a portion of a plan, report, or other item required to be submitted to EPA under this Consent Decree, the approved or modified portion shall be enforceable under this Consent Decree.

## **XII. PROJECT COORDINATORS**

45. Within 20 days of lodging this Consent Decree, Performing Defendant and EPA will notify each other, in writing, of the name, address and telephone number of their respective designated Project Coordinators and Alternate Project Coordinators. If a Project Coordinator or Alternate Project Coordinator initially designated is changed, the identity of the successor will be given to the other Parties at least 5 working days before the changes occur, unless impracticable, but in no event later than the actual day the change is made. The Performing Defendant's Project Coordinator shall be subject to disapproval by EPA and shall have the technical expertise sufficient to adequately oversee all aspects of the Work. The Performing Defendant's Project Coordinator shall not be an attorney for the Performing Defendant in this matter. He or she may assign other representatives, including other contractors, to serve as a Site representative for oversight of performance of daily operations during remedial activities.

46. Plaintiff may designate other representatives, including, but not limited to, EPA employees, and federal contractors and consultants, to observe and monitor the progress of any activity undertaken pursuant to this Consent Decree. EPA's Project Coordinator and Alternate Project Coordinator shall have the authority lawfully vested in a Remedial Project Manager (RPM) and an On-Scene Coordinator (OSC) by the National Contingency Plan, 40 C.F.R. Part 300. In addition, EPA's Project Coordinator or Alternate Project Coordinator shall have authority, consistent with the National Contingency Plan, to halt any Work required by this Consent Decree and to take any necessary response action when s/he determines that conditions at the Site constitute an emergency situation or may present an immediate threat to public health or welfare or the environment due to release or threatened release of Waste Material.

47. EPA's Project Coordinator and the Performing Defendant's Project Coordinator will meet, at a minimum, on a monthly basis.

### **XIII. ASSURANCE OF ABILITY TO COMPLETE WORK**

48. Within 30 days of entry of this Consent Decree, Performing Defendant shall establish and maintain financial security in the amount of \$1.6 million in one or more of the following forms:

1. A surety bond guaranteeing performance of the Work;
2. One or more irrevocable letters of credit equalling the total estimated cost of the Work;
3. A trust fund;
4. A guarantee to perform the Work by one or more parent corporations or subsidiaries, or by one or more unrelated corporations that have a substantial business relationship with the Performing Defendant; or
5. A demonstration that the Performing Defendant satisfies the requirements of 40 C.F.R. Part 264.143(f) or 40 C.F.R. 258.74 ;

49. If the Performing Defendant seeks to demonstrate the ability to complete the Work through a guarantee by a third party pursuant to Paragraph 48.4 of this Consent Decree, Performing Defendant shall demonstrate that the guarantor satisfies the requirements of 40 C.F.R. Part 264.143(f). If Performing Defendant seeks to demonstrate its ability to complete the Work by means of the financial test or the corporate guarantee pursuant to Paragraph 48.4 or 48.5, it shall resubmit sworn statements conveying the information required by 40 C.F.R. Part 264.143(f) annually, on the anniversary of the Effective Date. In the event that EPA determines at any time

that the financial assurances provided pursuant to this Section are inadequate, Performing Defendant shall, within 30 days of receipt of notice of EPA's determination, obtain and present to EPA for approval one of the other forms of financial assurance listed in Paragraph 48 of this Consent Decree. Performing Defendant's inability to demonstrate financial ability to complete the Work shall not excuse performance of any activities required under this Consent Decree.

50. If Performing Defendant can show that the estimated cost to complete the remaining Work has diminished below the amount set forth in Paragraph 48 above after entry of this Consent Decree, Performing Defendant may, on any anniversary date of entry of this Consent Decree, or at any other time agreed to by the Parties, reduce the amount of the financial security provided under this Section to the estimated cost of the remaining work to be performed. Performing Defendant shall submit a proposal for such reduction to EPA, in accordance with the requirements of this Section, and may reduce the amount of the security upon approval by EPA. In the event of a dispute, Performing Defendant may reduce the amount of the security in accordance with the final administrative or judicial decision resolving the dispute.

51. Performing Defendant may change the form of financial assurance provided under this Section at any time, upon notice to and approval by EPA, provided that the new form of assurance meets the requirements of this Section. In the event of a dispute, Performing Defendant may change the form of the financial assurance only in accordance with the final administrative or judicial decision resolving the dispute.

#### **XIV. CERTIFICATION OF COMPLETION**

52. Completion of the Remedial Action.

1. Within 90 days after Performing Defendant concludes that the Remedial Action has been fully performed and the Performance Standards have been attained, Performing Defendant shall schedule and conduct a pre-certification inspection to be attended by Performing Defendant and EPA. If, after the pre-certification inspection, the Performing Defendant still believes that the Remedial Action has been fully performed and the Performance Standards have been attained, it shall submit a written report requesting certification to EPA for approval, with a copy to the State, pursuant to Section XI (EPA Approval of Plans and Other Submissions) within 30 days of the inspection. In the report, a registered professional engineer and the Performing Defendant's Project Coordinator shall state that the Remedial Action has been completed in full satisfaction of the requirements of this Consent Decree. The written report shall include as-built drawings signed and stamped by a professional engineer. The report shall contain the following statement, signed by a responsible official of the Performing Defendant or the Performing Defendant's Project Coordinator:

To the best of my knowledge, after thorough investigation, I certify that the information contained in or accompanying this submission is true, accurate and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations.

If, after completion of the pre-certification inspection and receipt and review of the written report, EPA, after reasonable opportunity to review and comment by the State, determines that the Remedial Action or any portion thereof has not been completed in accordance with this Consent Decree or that the Performance Standards have not been achieved, EPA will notify Performing Defendant in writing of the activities that must be undertaken by Performing Defendant pursuant to this Consent Decree to complete the Remedial Action and achieve the Performance Standards.

Provided, however, that EPA may only require Performing Defendant to perform such activities pursuant to this Paragraph to the extent that such activities are consistent with the "scope of the remedy selected in the ROD," as that term is defined in Paragraph 14.2. EPA will set forth in the notice a schedule for performance of such activities consistent with the Consent Decree and the SOW or require the Performing Defendant to submit a schedule to EPA for approval pursuant to Section XI (EPA Approval of Plans and Other Submissions). Performing Defendant shall perform all activities described in the notice in accordance with the specifications and schedules established pursuant to this Paragraph, subject to its right to invoke the dispute resolution procedures set forth in Section XIX (Dispute Resolution).

2. If EPA concludes, based on the initial or any subsequent report requesting Certification of Completion and after a reasonable opportunity for review and comment by the State, that the Remedial Action has been performed in accordance with this Consent Decree and that the Performance Standards have been achieved, EPA will so certify in writing to Performing Defendant. This certification shall constitute the Certification of Completion of the Remedial Action for purposes of this Consent Decree, including, but not limited to, Section XXI (Covenants Not to Sue by Plaintiff). Certification of Completion of the Remedial Action shall not affect Performing Defendant's obligations under this Consent Decree.

53. Completion of the Work.

1. Within 90 days after Performing Defendant concludes that all phases of the Work (including O & M), have been fully performed, Performing Defendant shall schedule and conduct a pre-certification inspection to be attended by Performing Defendant and EPA. If, after the pre-certification inspection, the Performing Defendant still believes that the Work has been



fully performed, Performing Defendant shall submit a written report by a registered professional engineer stating that the Work has been completed in full satisfaction of the requirements of this Consent Decree. The report shall contain the following statement, signed by a responsible official of the Performing Defendant or the Performing Defendant's Project Coordinator:

To the best of my knowledge, after thorough investigation, I certify that the information contained in or accompanying this submission is true, accurate and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations.

If, after review of the written report, EPA, after reasonable opportunity to review and comment by the State, determines that any portion of the Work has not been completed in accordance with this Consent Decree, EPA will notify Performing Defendant in writing of the activities that must be undertaken by Performing Defendant pursuant to this Consent Decree to complete the Work.

Provided, however, that EPA may only require Performing Defendant to perform such activities pursuant to this Paragraph to the extent that such activities are consistent with the "scope of the remedy selected in the ROD," as that term is defined in Paragraph 14.2. EPA will set forth in the notice a schedule for performance of such activities consistent with the Consent Decree and the SOW or require the Performing Defendant to submit a schedule to EPA for approval pursuant to Section XI (EPA Approval of Plans and Other Submissions). Performing Defendant shall perform all activities described in the notice in accordance with the specifications and schedules established therein, subject to its right to invoke the dispute resolution procedures set forth in Section XIX (Dispute Resolution).

2. If EPA concludes, based on the initial or any subsequent request for Certification of Completion by Performing Defendant and after a reasonable opportunity for review

and comment by the State, that the Work has been performed in accordance with this Consent Decree, EPA will so notify the Performing Defendant in writing.

#### **XV. EMERGENCY RESPONSE**

54. In the event of any action or occurrence during the performance of the Work in Area C of the Middle Waterway Problem Area which causes or threatens a release of Waste Material from the Site that constitutes an emergency situation or may present an immediate threat to public health or welfare or the environment, Performing Defendant shall, subject to Paragraph 55, immediately take all appropriate action to prevent, abate, or minimize such release or threat of release, and shall immediately notify the EPA's Project Coordinator, or, if the Project Coordinator is unavailable, EPA's Alternate Project Coordinator. If neither of these persons is available, the Performing Defendant shall notify the EPA Emergency Response Unit, Region 10. Performing Defendant shall take such actions in consultation with EPA's Project Coordinator or other available authorized EPA officer and in accordance with all applicable provisions of the Health and Safety Plans, the Contingency Plans, and any other applicable plans or documents developed pursuant to the SOW. In the event that Performing Defendant fails to take appropriate response action as required by this Section, and EPA takes such action instead, Performing Defendant shall reimburse EPA all costs of the response action not inconsistent with the NCP pursuant to Section XVI (Reimbursement of Response Costs).

55. Nothing in the preceding Paragraph or in this Consent Decree shall be deemed to limit any authority of the United States a) to take all appropriate action to protect human health and the environment or to prevent, abate, respond to, or minimize an actual or threatened release of Waste Material on, at, or from the Site, or b) to direct or order such action, or seek an order from

the Court, to protect human health and the environment or to prevent, abate, respond to, or minimize an actual or threatened release of Waste Material on, at, or from the Site, subject to Section XXI (Covenants Not to Sue by Plaintiff).

#### **XVI. PAYMENTS FOR RESPONSE COSTS**

##### **56. Payment By and Certification of Settling Defendants**

1. Within fifteen (15) days of the entry of this Consent Decree, each Settling Defendant shall provide the United States with proof that it has deposited its respective share of funds that shall equal no less than \$1,300,000.00 into the appropriate account as follows:
  - a. if the MWAC Consent Decree is entered simultaneously with, or prior to, this Consent Decree, then within fifteen (15) days of entry of this Consent Decree, each Settling Defendant shall provide the United States with proof that each has deposited its respective share of \$1,300,000.00 into the MWAC Trust Account;
  - b. if the MWAC Consent Decree is not entered simultaneously with, or prior to, this Consent Decree, then within fifteen (15) days of entry of this Consent Decree, each Settling Defendant shall provide the United States with proof that each has deposited its respective share of \$1,300,000.00 into a dedicated interest-bearing escrow account in a federally-insured bank duly chartered in the State of Washington, and within fifteen (15) days of entry of the MWAC Consent Decree, the Settling Defendant shall provide the United States with proof that the funds in the dedicated escrow account have been distributed to the MWAC Trust Account; or
  - c. if the MWAC Consent Decree is not entered, the Settling Defendants shall transfer the funds from the dedicated escrow account into the Middle Waterway Special Account within fifteen (15) days of EPA's written request to do so. The Settling Defendants shall

send notice in accordance with Section XXVI (Notices and Submissions) that payment has been made as provided in this Paragraph.

2. By signing this Consent Decree, each Settling Defendant certifies, individually, that, to the best of its knowledge and belief, it has:

a. Conducted a thorough, comprehensive, good faith search for documents, and has fully and accurately disclosed to EPA all information currently in its possession, or in the possession of its officers, directors, employees, contractors, or agents, which relates in any way to the ownership, operation, or control of the Middle Waterway Problem Area, or to the ownership, possession, generation, treatment, transportation, storage, or disposal of a hazardous substance, pollutant, or contaminant at or in connection with the Middle Waterway Problem Area;

b. Not altered, mutilated, discarded, destroyed or otherwise disposed of any records, documents, or other information (other than identical copies) relating to its potential liability regarding the Middle Waterway Problem Area after notification of potential liability or the filing of a suit against it regarding the Middle Waterway Problem Area; and

c. Fully complied with any and all EPA requests for information regarding the Middle Waterway Problem Area pursuant to Section 104(e) of CERCLA, 42 U.S.C. Section 9604(e).

This certification inures only to the benefit of the United States, and not to any other entity.

57. Payments for Future Response Costs.

1. Performing Defendant shall pay to EPA all Future Response Costs not inconsistent with the National Contingency Plan, excluding the first \$50,000 of Future Oversight Costs incurred after EPA's approval of the Remedial Design in connection to Performing

Defendant's implementation of Remedial Action. On a periodic basis the United States will send Performing Defendant a bill requiring payment that includes a Superfund Cost Recovery Package Imaging and Online System ("SCORPIOS") report and a cost summary prepared by the United States Department of Justice that reflects costs incurred by the United States Department of Justice and its contractors, if any. Performing Defendant shall make all payments within 30 days of Performing Defendant's receipt of each bill requiring payment, except as otherwise provided in Paragraph 58. Performing Defendant shall make all payments required by this Paragraph by a certified or cashier's check or checks made payable to "EPA Hazardous Substance Superfund," referencing the name and address of the party making the payment, EPA Site/Spill ID Number 10-9L, and DOJ Case Number 90-11-2-729/1. Performing Defendant shall send the check(s) to:

Mellon Bank  
EPA-Region 10  
ATTN: Superfund Accounting  
P.O. Box 360903M  
Pittsburgh, PA 15251

2. At the time of payment, Performing Defendant shall send notice that payment has been made to the United States, to EPA and to the Regional Financial Management Officer, in accordance with Section XXVI (Notices and Submissions).

3. The total amount to be paid by Performing Defendant pursuant to Subparagraph 57.1 shall be deposited in the Commencement Bay/Nearshore TideFlats Superfund Site Middle Waterway Special Account within the EPA Hazardous Substance Superfund to be retained and used to conduct or finance response actions at or in connection with the Site, or to be transferred by EPA to the EPA Hazardous Substance Superfund.

58. Performing Defendant may contest payment of any Future Response Costs under Paragraph 57 if it determines that the United States has made an accounting error or if it alleges that a cost item that is included represents costs that are inconsistent with the NCP. Such objection shall be made in writing within 30 days of receipt of the bill and must be sent to the United States pursuant to Section XXVI (Notices and Submissions). Any such objection shall specifically identify the contested Future Response Costs and the basis for objection. In the event of an objection, the Performing Defendant shall within the 30 day period pay all uncontested Future Response Costs to the United States in the manner described in Paragraph 57. Simultaneously, the Performing Defendant shall establish an interest-bearing escrow account in a federally-insured bank duly chartered in the State of Washington and remit to that escrow account funds equivalent to the amount of the contested Future Response Costs. The Performing Defendant shall send to the United States, as provided in Section XXVI (Notices and Submissions), a copy of the transmittal letter and check paying the uncontested Future Response Costs, and a copy of the correspondence that establishes and funds the escrow account, including, but not limited to, information containing the identity of the bank and bank account under which the escrow account is established as well as a bank statement showing the initial balance of the escrow account. Simultaneously with establishment of the escrow account, the Performing Defendant shall initiate the Dispute Resolution procedures in Section XIX (Dispute Resolution). If the United States prevails in the dispute, within five (5) days of the resolution of the dispute, the Performing Defendant shall pay the sums due (with accrued interest) to the United States in the manner described in Paragraph 57. If the Performing Defendant prevails concerning any aspect of the contested costs, the Performing Defendant shall pay that portion of the costs (plus associated accrued interest) for which it did not

prevail to the United States in the manner described in Paragraph 57; Performing Defendant shall be disbursed any balance of the escrow account. The dispute resolution procedures set forth in this Paragraph in conjunction with the procedures set forth in Section XIX (Dispute Resolution) shall be the exclusive mechanisms for resolving disputes regarding the Performing Defendant's obligation to reimburse the United States for its Future Response Costs.

59. In the event that the payments required by Paragraph 57 are not made within 30 days of the Performing Defendant's receipt of the bill, Performing Defendant shall pay Interest on the unpaid balance. The Interest on Future Response Costs shall begin to accrue on the date of the bill. The Interest shall accrue through the date of the Performing Defendant's payment. Payments of Interest made under this shall be in addition to such other remedies or sanctions available to Plaintiff by virtue of Performing Defendant's failure to make timely payments under this Section including but not limited to, payment of stipulated penalties. The Performing Defendant shall make all payments required by this Paragraph in the manner described in Paragraph 57.

## **XVII. INDEMNIFICATION AND INSURANCE**

### **60. Performing Defendant's Indemnification of the United States.**

1. The United States does not assume any liability by entering into this agreement or by virtue of any designation of Performing Defendant as EPA's authorized representative under Section 104(e) of CERCLA. To the extent permitted by law, Performing Defendant shall indemnify, save and hold harmless the United States and its officials, agents, employees, contractors, subcontractors, or representatives for or from any and all claims or causes of action arising from, or on account of, negligent or other wrongful acts or omissions of Performing Defendant, its officers, directors, employees, agents, contractors, subcontractors, and

any persons acting on its behalf or under its control, in carrying out activities pursuant to this Consent Decree, including, but not limited to, any claims arising from any designation of Performing Defendant as EPA's authorized representative under Section 104(e) of CERCLA. Further, to the extent permitted by law, the Performing Defendant agrees to pay the United States all costs it incurs including, but not limited to, attorneys fees and other expenses of litigation and settlement arising from, or on account of, claims made against the United States based on negligent or other wrongful acts or omissions of Performing Defendant, its officers, directors, employees, agents, contractors, subcontractors, and any persons acting on its behalf or under its control, in carrying out activities pursuant to this Consent Decree. The United States shall not be held out as a party to any contract entered into by or on behalf of Performing Defendant in carrying out activities pursuant to this Consent Decree. Neither the Performing Defendant nor any such contractor shall be considered an agent of the United States .

2. The United States shall give Performing Defendant notice of any claim for which the United States plans to seek indemnification pursuant to Paragraph 60, and shall consult with Performing Defendant prior to settling such claim.

61. Performing Defendant waives all claims against the United States for damages or reimbursement or for set-off of any payments made or to be made to the United States, arising from or on account of any contract, agreement, or arrangement between Performing Defendant and any person for performance of Work on or relating to the Site, including, but not limited to, claims on account of construction delays. In addition, to the extent permitted by law, Performing Defendant shall indemnify and hold harmless the United States with respect to any and all claims for damages or reimbursement arising from or on account of any contract, agreement, or arrangement between



the Performing Defendant and any person for performance of Work on or relating to the Site, including, but not limited to, claims on account of construction delays.

62. No later than 15 days before commencing any on-site Work, Performing Defendant shall secure, and shall maintain until the first anniversary of EPA's Certification of Completion of the Remedial Action pursuant to Subparagraph 52.2 of Section XIV (Certification of Completion) comprehensive general liability insurance with limits of \$5 million dollars, combined single limit, and automobile liability insurance with limits of \$1 million dollars, combined single limit, naming the United States as an additional insured. In addition, for the duration of this Consent Decree, Performing Defendant shall satisfy, or shall ensure that its contractors or subcontractors satisfy, all applicable laws and regulations regarding the provision of worker's compensation insurance for all persons performing the Work on behalf of Performing Defendant in furtherance of this Consent Decree. Prior to commencement of the Work under this Consent Decree, Performing Defendant shall provide to EPA certificates of such insurance and a copy of each insurance policy. Performing Defendant shall resubmit such certificates and copies of policies each year on the anniversary of the Effective Date. If Performing Defendant demonstrates by evidence satisfactory to EPA that any contractor or subcontractor maintains insurance equivalent to that described above, or insurance covering the same risks but in a lesser amount, then, with respect to that contractor or subcontractor, Performing Defendant need provide only that portion of the insurance described above which is not maintained by the contractor or subcontractor.

#### **XVIII. FORCE MAJEURE**

63. "Force majeure," for purposes of this Consent Decree, is defined as any event arising from causes beyond the control of the Performing Defendant, of any entity controlled by

Performing Defendant, or of Performing Defendant's contractors, that delays or prevents the performance of any obligation under this Consent Decree despite Performing Defendant's best efforts to fulfill the obligation. The requirement that the Performing Defendant exercise "best efforts to fulfill the obligation" includes using best efforts to anticipate any potential force majeure event and best efforts to address the effects of any potential force majeure event (1) as it is occurring and (2) following the potential force majeure event, such that the delay is minimized to the greatest extent possible. "Force Majeure" does not include financial inability to complete the Work or a failure to attain the Performance Standards.

64. If any event occurs or has occurred that may delay the performance of any obligation under this Consent Decree, whether or not caused by a force majeure event, the Performing Defendant shall notify orally EPA's Project Coordinator or, in his or her absence, EPA's Alternate Project Coordinator or, in the event both of EPA's designated representatives are unavailable, the Director of the Office of Environmental Cleanup, EPA Region 10, within 48 hours of when Performing Defendant first knew that the event might cause a delay. If the 48 hour notification period terminates on a Saturday, Sunday or federal or state holiday, the Performing Defendant shall provide the oral notice no later than 12:00 p.m. (Noon) on the next working day. Within 5 days thereafter, Performing Defendant shall provide in writing to EPA an explanation and description of the reasons for the delay; the anticipated duration of the delay; all actions taken or to be taken to prevent or minimize the delay; a schedule for implementation of any measures to be taken to prevent or mitigate the delay or the effect of the delay; the Performing Defendant's rationale for attributing such delay to a force majeure event if it intends to assert such a claim; and a statement as to whether, in the opinion of the Performing Defendant, such event may cause or

contribute to an endangerment to public health, welfare or the environment. The Performing Defendant shall include with any notice all available documentation supporting its claim that the delay was attributable to a force majeure. If Performing Defendant alleges failure to obtain access as a force majeure event, Performing Defendant must document in writing specifically what efforts, communications, and offers were made by the Performing Defendant to obtain access and provide a detailed explanation of how it used best efforts in obtaining access required by Paragraphs 27 and 28 of this Consent Decree. Failure to comply with the above requirements shall preclude Performing Defendant from asserting any claim of force majeure for that event for the period of time of such failure to comply, and for any additional delay caused by such failure. Performing Defendant shall be deemed to know of any circumstance of which Performing Defendant, any entity controlled by Performing Defendant, or Performing Defendant's contractors knew or should have known.

65. If EPA agrees that the delay or anticipated delay is attributable to a force majeure event, the time for performance of the obligations under this Consent Decree that are affected by the force majeure event will be extended by EPA for such time as is necessary to complete those obligations. An extension of the time for performance of the obligations affected by the force majeure event shall not, of itself, extend the time for performance of any other obligation. If EPA does not agree that the delay or anticipated delay has been or will be caused by a force majeure event, EPA will notify the Performing Defendant in writing of its decision. If EPA agrees that the delay is attributable to a force majeure event, EPA will notify the Performing Defendant in writing of the length of the extension, if any, for performance of the obligations affected by the force majeure event.

66. If the Performing Defendant elects to invoke the dispute resolution procedures set forth in Section XIX (Dispute Resolution), it shall do so no later than 15 days after receipt of EPA's notice. In any such proceeding, Performing Defendant shall have the burden of demonstrating by a preponderance of the evidence that the delay or anticipated delay has been or will be caused by a force majeure event, that the duration of the delay or the extension sought was or will be warranted under the circumstances, that best efforts were exercised to avoid and mitigate the effects of the delay, and that Performing Defendant complied with the requirements of Paragraphs 63 and 64, above. If Performing Defendant carries this burden, the delay at issue shall be deemed not to be a violation by Performing Defendant of the affected obligation of this Consent Decree identified to EPA and the Court.

#### **XIX. DISPUTE RESOLUTION**

67. Unless otherwise expressly provided for in this Consent Decree, the dispute resolution procedures of this Section shall be the exclusive mechanism to resolve disputes arising under or with respect to this Consent Decree. However, the procedures set forth in this Section shall not apply to actions by the United States to enforce obligations of the Performing Defendant that have not been disputed in accordance with this Section.

68. Any dispute which arises under or with respect to this Consent Decree shall in the first instance be the subject of informal negotiations between the parties to the dispute. The period for informal negotiations shall not exceed 20 days from the time the dispute arises, unless it is modified by written agreement of the parties to the dispute. The dispute shall be considered to have arisen when one party sends the other parties a written Notice of Dispute.

69. Statements of Position.

1. In the event that the parties cannot resolve a dispute by informal negotiations under the preceding Paragraph, then the position advanced by EPA shall be considered binding unless, within 20 days after the conclusion of the informal negotiation period, Performing Defendant invokes the formal dispute resolution procedures of this Section by serving on the United States a written Statement of Position on the matter in dispute, including, but not limited to, any factual data, analysis or opinion supporting that position and any supporting documentation relied upon by the Performing Defendant. The Statement of Position shall specify the Performing Defendant's position as to whether formal dispute resolution should proceed under Paragraph 70 or Paragraph 71.

2. Within 20 days after receipt of Performing Defendant's Statement of Position, EPA will serve on Performing Defendant its Statement of Position, including, but not limited to, any factual data, analysis, or opinion supporting that position and all supporting documentation relied upon by EPA. EPA's Statement of Position shall include a statement as to whether formal dispute resolution should proceed under Paragraph 70 or 71. Within 7 days after receipt of EPA's Statement of Position, Performing Defendant may submit a Reply.

3. If there is disagreement between EPA and the Performing Defendant as to whether dispute resolution should proceed under Paragraph 70 or 71, the parties to the dispute shall follow the procedures set forth in the paragraph determined by EPA to be applicable. However, if the Performing Defendant ultimately appeals to the Court to resolve the dispute, the Court shall determine which paragraph is applicable in accordance with the standards of applicability set forth in Paragraphs 70 and 71.

70. Formal dispute resolution for disputes pertaining to the selection or adequacy of any response action and all other disputes that are accorded review on the administrative record under applicable principles of administrative law shall be conducted pursuant to the procedures set forth in this Paragraph. For purposes of this Paragraph, the adequacy of any response action includes, without limitation: (1) the adequacy or appropriateness of plans, procedures to implement plans, or any other items requiring approval by EPA under this Consent Decree; and (2) the adequacy of the performance of response actions taken pursuant to this Consent Decree. Nothing in this Consent Decree shall be construed to allow any dispute by Settling Defendants regarding the validity of the ROD's provisions.

1. An administrative record of the dispute shall be maintained by EPA and shall contain all statements of position, including supporting documentation, submitted pursuant to this Section. Where appropriate, EPA may allow submission of supplemental statements of position by the parties to the dispute.

2. The Director of the Office of Environment Cleanup, EPA Region 10, will issue a final administrative decision resolving the dispute based on the administrative record described in Paragraph 70.1. This decision shall be binding upon the Performing Defendant, subject only to the right to seek judicial review pursuant to Paragraph 70.3 and 70.4.

3. Any administrative decision made by EPA pursuant to Paragraph 70.2. shall be reviewable by this Court, provided that a motion for judicial review of the decision is filed by the Performing Defendant with the Court and served on all Parties within 10 days of receipt of EPA's decision. The motion shall include a description of the matter in dispute, the efforts made by the parties to resolve it, the relief requested, and the schedule, if any, within which the dispute

must be resolved to ensure orderly implementation of this Consent Decree. The United States may file a response to Performing Defendant's motion.

4. In proceedings on any dispute governed by this Paragraph, Performing Defendant shall have the burden of demonstrating that the decision of the Office of Environmental Cleanup Director is arbitrary and capricious or otherwise not in accordance with law. Judicial review of EPA's decision shall be on the administrative record compiled pursuant to Paragraph 70.1.

71. Formal dispute resolution for disputes that neither pertain to the selection or adequacy of any response action nor are otherwise accorded review on the administrative record under applicable principles of administrative law, shall be governed by this Paragraph.

1. Following receipt of Performing Defendant's Statement of Position submitted pursuant to Paragraph 69, the Director of the Office of Environmental Cleanup, EPA Region 10, will issue a final decision resolving the dispute. The Office of Environmental Cleanup Director's decision shall be binding on the Performing Defendant unless, within 10 days of receipt of the decision, the Performing Defendant files with the Court and serves on the parties a motion for judicial review of the decision setting forth the matter in dispute, the efforts made by the parties to resolve it, the relief requested, and the schedule, if any, within which the dispute must be resolved to ensure orderly implementation of the Consent Decree. The United States may file a response to Performing Defendant's motion.

2. Notwithstanding Paragraph Z of Section I (Background) of this Consent Decree, judicial review of any dispute governed by this Paragraph shall be governed by applicable principles of law.

72. The invocation of formal dispute resolution procedures under this Section shall not extend, postpone or affect in any way any obligation of the Performing Defendant under this Consent Decree, not directly in dispute, unless EPA or the Court agrees otherwise. Stipulated penalties with respect to the disputed matter shall continue to accrue but payment shall be stayed pending resolution of the dispute as provided in Paragraph 81. Notwithstanding the stay of payment, stipulated penalties shall accrue from the first day of noncompliance with any applicable provision of this Consent Decree. In the event that the Performing Defendant does not prevail on the disputed issue, stipulated penalties shall be assessed and paid as provided in Section XX (Stipulated Penalties).

#### **XX. STIPULATED PENALTIES**

73. Performing Defendant shall be liable for stipulated penalties in the amounts set forth in Paragraphs 74 and 75 to the United States for failure to comply with the requirements of this Consent Decree specified below, unless excused under Section XVIII (Force Majeure). If DNR accrues stipulated penalties in amounts that exceed existing appropriations therefor, then DNR's payment of those stipulated penalties shall be subject to legislative appropriation.

"Compliance" by Performing Defendant shall include completion of the activities under this Consent Decree or any work plan or other plan approved under this Consent Decree identified below in accordance with all applicable requirements of law, this Consent Decree, the SOW, and any plans or other documents approved by EPA pursuant to this Consent Decree and within the specified time schedules established by and approved under this Consent Decree.

#### **74. Stipulated Penalty Amounts - Work.**



1. The Performing Defendant shall be responsible for payment of the following stipulated penalties that shall accrue per violation per day for any noncompliance identified in Subparagraph 74.2:

<u>Penalty Per Violation Per Day</u>	<u>Period of Noncompliance</u>
\$1,000	1st through 14th day
\$5,000	15th through 30th day
\$8,000	31st day and beyond

2. Compliance Milestones.

1. Remedial Design submittal - failure to submit timely or adequate draft and revised final drafts.
2. Remedial Action Work Plan - failure to submit timely or adequate draft and revised final drafts.
3. Remedial Action Construction Schedules -- failure to perform remedial action construction or any discrete phases and/or individual components of the remedial action on the approved schedule or in an adequate manner or not in compliance with the SOW or approved remedial action work plan or deliverables.
4. Completion Reports - failure to submit timely or adequate completion reports listed below.
  - a. Remedial Action Construction Report.
  - b. Remedial Action Completion Report.
5. Operation and Maintenance

- a. failure to perform timely and adequate monitoring in accordance with the approved Operation and Maintenance Plan and approved schedule.
- b. failure to submit timely and adequate monitoring reports.
- c. failure to perform maintenance on any component of the remedial action on the required schedule and in accordance with approved work plans or EPA requests.

75. Stipulated Penalty Amounts - Reports.

1. The Performing Defendant shall be responsible for payment of the following stipulated penalties that shall accrue per violation per day for failure to submit timely or adequate reports or other written documents required by the SOW or this Consent Decree, except those listed in Paragraph 74.2. above, or any other violation of this Consent Decree :

<u>Penalty Per Violation Per Day</u>	<u>Period of Noncompliance</u>
\$500	1st through 14th day
\$1,000	15th through 30th day
\$2,500	31st day and beyond

76. In the event that EPA assumes performance of a portion or all of the Work pursuant to Paragraph 90 of Section XXI (Covenants Not to Sue by Plaintiff), Performing Defendant shall be liable for a stipulated penalty in the amount of \$1,600,000.

77. All penalties shall begin to accrue on the day after the complete performance is due or the day a violation occurs, and shall continue to accrue through the final day of the correction of the noncompliance or completion of the activity. However, stipulated penalties shall not accrue:

(1) with respect to a deficient submission under Section XI (EPA Approval of Plans and Other Submissions), during the period, if any, beginning on the 31st day after EPA's receipt of such submission until the date that EPA notifies the Performing Defendant of any deficiency; (2) with respect to a decision by the Director of the Office of Environmental Cleanup, EPA Region 10, under Paragraph 70.2 or 71.1 of Section XIX (Dispute Resolution), during the period, if any, beginning on the 21st day after the date that the Performing Defendant's reply to EPA's Statement of Position is received until the date that the Director issues a final decision regarding such dispute; (3) with respect to judicial review by this Court of any dispute under Section XIX (Dispute Resolution), during the period, if any, beginning on the 31st day after the Court's receipt of the final submission regarding the dispute until the date that the Court issues a final decision regarding such dispute. Nothing herein shall prevent the simultaneous accrual of separate penalties for separate violations of this Consent Decree.

78. Following EPA's determination that the Performing Defendant has failed to comply with a requirement of this Consent Decree, EPA may give the Performing Defendant written notification of the same and describe the noncompliance. EPA may send the Performing Defendant a written demand for the payment of the penalties. However, penalties shall accrue as provided in the preceding Paragraph regardless of whether EPA has notified the Performing Defendant of a violation. In the event that the City becomes the Performing Defendant, the City shall not be responsible for stipulated penalties incurred and/or owed by DNR.

79. All penalties accruing under this Section shall be due and payable to the United States within 30 days of the Performing Defendant's receipt from EPA of a demand for payment of the penalties, unless the Performing Defendant invokes the Dispute Resolution procedures under

Section XIX (Dispute Resolution). All payments to the United States under this Section shall be paid by certified or cashier's check(s) made payable to "EPA Hazardous Substances Superfund," shall be mailed to Mellon Bank, EPA-Region 10, ATTN Superfund Accounting, P.O. Box 360903M, Pittsburgh, PA 15251, shall indicate that the payment is for stipulated penalties, and shall reference the EPA Region and Site/Spill ID, and DOJ Case Number 90-11-2-729/1, and the name and address of the party making payment. Copies of check(s) paid pursuant to this Section, and any accompanying transmittal letter(s), shall be sent to the United States as provided in Section XXVI (Notices and Submissions), and to the EPA Regional Financial Management Officer.

80. The payment of penalties shall not alter in any way the Performing Defendant's obligation to complete the performance of the Work required under this Consent Decree.

81. Penalties shall continue to accrue as provided in Paragraph 77 during any dispute resolution period, but need not be paid until the following:

1. If the dispute is resolved by agreement or by a decision of EPA that is not appealed to this Court, accrued penalties determined to be owing shall be paid to EPA within 15 days of the agreement or the receipt of EPA's decision or order;

2. If the dispute is appealed to this Court and the United States prevails in whole or in part, the Performing Defendant shall pay all accrued penalties determined by the Court to be owed to EPA within 60 days of receipt of the Court's decision or order, except as provided in Subparagraph 3 below;

3. If the District Court's decision is appealed by any Party, the Performing Defendant shall pay all accrued penalties determined by the District Court to be owing to the United States into an interest-bearing escrow account within 60 days of receipt of the Court's

decision or order. Penalties shall be paid into this account as they continue to accrue, at least every 60 days. Within 15 days of receipt of the final appellate court decision, the escrow agent shall pay the balance of the account to EPA or to the Performing Defendant to the extent that it prevails.

4. If the Washington State legislature makes an appropriation to DNR that provides funds to pay for stipulated penalties owed to the United States pursuant to this Consent Decree, DNR shall pay all accrued penalties owed to the United States within 30 days of the appropriation.

82. If the Performing Defendant fails to pay stipulated penalties when due, the United States may institute proceedings to collect the penalties, as well as interest. The Performing Defendant shall pay interest on the unpaid balance, which shall begin to accrue on the date of demand made pursuant to Paragraph 79.

83. Nothing in this Consent Decree shall be construed as prohibiting, altering, or in any way limiting the ability of the United States to seek any other remedies or sanctions available by virtue of the Performing Defendant's or a Settling Defendant's violation of this Decree or of the statutes and regulations upon which it is based, including, but not limited to, penalties pursuant to Section 122(l) of CERCLA. Provided, however, that the United States shall not seek civil penalties pursuant to Section 122(l) of CERCLA for any violation for which a stipulated penalty has been paid, except in the case of a willful violation of the Consent Decree.

84. Notwithstanding any other provision of this Section, the United States may, in its unreviewable discretion, waive any portion of stipulated penalties that have accrued pursuant to this Consent Decree.

## **XXI. COVENANTS NOT TO SUE BY PLAINTIFF**

85. In consideration of the actions that will be performed and the payments that will be made by the Settling Defendants under the terms of the Consent Decree, and except as specifically provided in Paragraphs 86, 87, and 89 of this Section, the United States covenants not to sue or to take administrative action against Settling Defendants pursuant to Sections 106 and 107(a) of CERCLA relating to the Middle Waterway Problem Area. Except with respect to future liability of DNR and the City, these covenants not to sue shall take effect upon each Settling Defendant satisfying its initial payment obligation under Paragraph 56.1 of this Consent Decree. With respect to future liability of DNR and the City, these covenants not to sue for Area C of the Middle Waterway Problem Area shall take effect upon Certification of Completion of Remedial Action for Area C by EPA pursuant to Paragraph 52.2 of Section XIV (Certification of Completion). With respect to future liability of DNR and the City, these covenants not to sue shall take effect for Areas A and B of the Middle Waterway Problem Area upon Certification of Completion of remedial action for Areas A and B pursuant to the MWAC Consent Decree. These covenants not to sue are conditioned upon the satisfactory performance by Settling Defendants of their obligations under this Consent Decree. These covenants not to sue extend only to the Settling Defendants and do not extend to any other person.

86. United States' Pre-certification Reservations. Notwithstanding any other provision of this Consent Decree, the United States reserves, and this Consent Decree is without prejudice to, the right to institute proceedings in this action or in a new action, or to issue an administrative order seeking to compel Settling Defendants

1. to perform further response actions relating to the Site;

2. to reimburse the United States for additional costs of response if, prior to Certification of Completion of the Remedial Action:

(1) conditions at the Site, previously unknown to EPA, are discovered,

or

(2) information, previously unknown to EPA, is received, in whole or in part,

and EPA determines that these previously unknown conditions or information together with any other relevant information indicates that the Remedial Action is not protective of human health or the environment.

87. United States' Post-certification Reservations. Notwithstanding any other provision of this Consent Decree, the United States reserves, and this Consent Decree is without prejudice to, the right to institute proceedings in this action or in a new action, or to issue an administrative order seeking to compel Settling Defendants

1. to perform further response actions relating to the Site or

2. to reimburse the United States for additional costs of response if, subsequent to Certification of Completion of the Remedial Action:

(1) conditions at the Site, previously unknown to EPA, are discovered,

or

(2) information, previously unknown to EPA, is received, in whole or in part,

and EPA determines that these previously unknown conditions or this information together with other relevant information indicate that the Remedial Action is not protective of human health or the environment.

88. For purposes of Paragraph 86, the information and the conditions known to EPA shall include only that information and those conditions known to EPA as of the date this Consent Decree is lodged, as set forth in the ROD, and the administrative record supporting the ROD. For purposes of Paragraph 87, the information and the conditions known to EPA shall include only that information and those conditions known to EPA as of the date of Certification of Completion of the Remedial Action and set forth in the ROD, the administrative record supporting the ROD, the post-ROD administrative record, or in any information received by EPA pursuant to the requirements of this Consent Decree prior to Certification of Completion of the Remedial Action.

89. General reservations of rights. The United States reserves, and this Consent Decree is without prejudice to, all rights against Settling Defendants with respect to all matters not expressly included within Plaintiff's covenant not to sue. Notwithstanding any other provision of this Consent Decree, the United States reserves all rights against Settling Defendants with respect to:

1. claims based on a failure by Settling Defendants to meet a requirement of this Consent Decree;
2. liability arising from the past, present, or future disposal, release, or threat of release of Waste Materials outside of the Site;
3. liability based upon the Settling Defendants' ownership or operation of the Site, or upon the Settling Defendants' transportation, treatment, storage, or disposal, or the



arrangement for the transportation, treatment, storage, or disposal of Waste Material at or in connection with the Site, other than as provided in the ROD, the Work, or otherwise ordered by EPA, after signature of this Consent Decree by the Settling Defendants ;

4. with the exception of the City, DNR and Simpson, liability for damages for injury to, destruction of, or loss of natural resources, and for the costs of any natural resource damage assessments;

5. criminal liability;

6. liability for violations of federal or state law which occur during or after implementation of the Remedial Action; and

7. with the exception of all Funding Defendants except the City, liability, prior to Certification of Completion of the Remedial Action, for additional response actions that EPA determines are necessary to achieve Performance Standards, but that cannot be required pursuant to Paragraph 14 (Modification of the SOW or Related Work Plans); and

8. liability for costs incurred or to be incurred by the Agency for Toxic Substances and Disease Registry related to the Site.

90. Work Takeover In the event EPA determines that Performing Defendant has ceased implementation of any portion of the Work, is seriously or repeatedly deficient or late in its performance of the Work, or is implementing the Work in a manner which may cause an endangerment to human health or the environment, EPA may assume the performance of all or any portions of the Work as EPA determines necessary. Performing Defendant may invoke the procedures set forth in Section XIX (Dispute Resolution), Paragraph 70, to dispute EPA's determination that takeover of the Work is warranted under this Paragraph. Costs incurred by the

United States in performing the Work pursuant to this Paragraph shall be considered Future Response Costs that Performing Defendant shall pay pursuant to Section XVI (Payments for Response Costs).

91. Notwithstanding any other provision of this Consent Decree, the United States retains all authority and reserves all rights to take any and all response actions authorized by law.

## **XXII. COVENANTS BY SETTLING DEFENDANTS**

92. Covenant Not to Sue. Subject to the reservations in Paragraph 93, Settling Defendants hereby covenant not to sue and agree not to assert any claims or causes of action against the United States with respect to the Middle Waterway Problem Area or this Consent Decree, including, but not limited to:

1. any direct or indirect claim for reimbursement from the Hazardous Substance Superfund (established pursuant to the Internal Revenue Code, 26 U.S.C. § 9507) through CERCLA Sections 106(b)(2), 107, 111, 112, 113 or any other provision of law;
2. any claims against the United States, including any department, agency or instrumentality of the United States under CERCLA Sections 107 or 113 related to the Site, or
3. any claims arising out of response actions at or in connection with the Site, including any claim under the United States Constitution, the Washington State Constitution, the Tucker Act, 28 U.S.C. § 1491, the Equal Access to Justice Act, 28 U.S.C. § 2412, as amended, or at common law.

Except as provided Paragraph 103 (waiver of Claim-Splitting Defenses), these covenants not to sue shall not apply in the event that the United States brings a cause of action or issues an order pursuant to the reservations set forth in Paragraphs 86, 87, 89 (2) - (4) or 89 (7) - (8), but

only to the extent that Settling Defendants' claims arise from the same response action, response costs, or damages that the United States is seeking pursuant to the applicable reservation.

93. The Settling Defendants reserve, and this Consent Decree is without prejudice to, claims against the United States, subject to the provisions of Chapter 171 of Title 28 of the United States Code, for money damages for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the United States while acting within the scope of his office or employment under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred. However, any such claim shall not include a claim for any damages caused, in whole or in part, by the act or omission of any person, including any contractor, who is not a federal employee as that term is defined in 28 U.S.C. § 2671; nor shall any such claim include a claim based on EPA's selection of response actions, or the oversight or approval of the Settling Defendants' plans or activities. The foregoing applies only to claims which are brought pursuant to any statute other than CERCLA and for which the waiver of sovereign immunity is found in a statute other than CERCLA;

94. Nothing in this Consent Decree shall be deemed to constitute preauthorization of a claim within the meaning of Section 111 of CERCLA, 42 U.S.C. § 9611, or 40 C.F.R. § 300.700(d).

95. Effective upon entry of this Consent Decree, and except for claims reserved in Paragraph 98 of this Consent Decree, each Settling Defendant covenants not to sue and agrees not to assert: (a) any claims or causes of action against any other Settling Defendant with regard to the Middle Waterway Problem Area pursuant to Sections 107 and 113 of CERCLA, 42 U.S.C. §§

9607 & 9613, for Matters Addressed in this Consent Decree, or (b) any claims or causes of action against any other Settling Defendant under any other statutory provision or the common law that arise from or are related to hazardous substances, materials, pollutants or contaminants present in intertidal and subtidal sediment and shoreline to the top of the bank within the Middle Waterway Problem Area and property owned by such Settling Defendant immediately adjacent to or adjoining the Middle Waterway Problem Area, as of the Effective Date of this Consent Decree.

96. Effective upon entry of the MWAC Consent Decree, and except for claims reserved in Paragraph 98, each Settling Defendant covenants not to sue and agrees not to assert: (a) any claims or causes of action against Foss Maritime Company, Marine Industries Northwest, Inc., or Pioneer Industries, Inc., with regard to the Middle Waterway Problem Area pursuant to sections 107 and 113 of CERCLA, 42 U.S.C. §§ 9607 & 9613, for Matters Addressed in this Consent Decree and in the MWAC Consent Decree; or (b) any other claims or causes of action against Foss Maritime Company, Marine Industries Northwest, Inc., or Pioneer Industries, Inc. under any other statutory provision or the common law that arise from or are related to hazardous substances, materials, pollutants or contaminants present in the intertidal and subtidal sediment and shoreline to the top of the bank within the Middle Waterway Problem Area and property owned by such Settling Defendant immediately adjacent to or adjoining the Middle Waterway Problem Area, as of the Effective Date of this Consent Decree.

97. The waiver of claims contained in section 95.b and 96.b above shall not extend to those response costs or response actions as to which the United States has reserved and asserted its rights under this Consent Decree or the MWAC Consent Decree (except for claims for failure to

comply with the Decrees), or to which Settling Defendants have reserved their rights in Paragraph 98 of this Consent Decree.

98. The Settling Defendants reserve and this Consent Decree is without prejudice to, claims against each other, the settling defendants performing remedial design or remedial action under this Consent Decree, the MWAC Consent Decree or the Thea Foss/Wheeler Osgood Consent Decrees or their respective contractors for money or other damages for injury or loss of property or personal injury or death caused by negligent or wrongful act or omission of such settling defendant or its contractors during the performance of remedial design and remedial action, including damages or response costs for contamination or recontamination or other harm to Restoration Sites or areas remedied under this Consent Decree or the MWAC Consent Decree.

#### **XXIII. EFFECT OF SETTLEMENT; CONTRIBUTION PROTECTION**

99. Except as provided Paragraphs 95 through 98, Nothing in this Consent Decree shall be construed to create any rights in, or grant any cause of action to, any person not a Party to this Consent Decree. The preceding sentence shall not be construed to waive or nullify any rights that any person not a signatory to this decree may have under applicable law. Except as provided in Paragraphs 95 through 98, each of the Parties expressly reserves any and all rights (including, but not limited to, any right to contribution), defenses, claims, demands, and causes of action which each Party may have with respect to any matter, transaction, or occurrence relating in any way to the Middle Waterway Problem Area against any person not a Party hereto.

100. The Parties agree, and by entering this Consent Decree this Court finds, that the Settling Defendants are entitled, as of the Effective Date, to protection from contribution actions or claims as provided by CERCLA Section 113(f)(2), 42 U.S.C. § 9613(f)(2) for matters addressed in

this Consent Decree. For the purposes of this Consent Decree and as used in this paragraph and in Paragraphs 95 and 96 "Matters Addressed" shall mean all response actions taken or to be taken and all response costs incurred or to be incurred by the United States or any other person with respect to the Middle Waterway Problem Area. Matters Addressed shall not include those response costs or response actions as to which the United States has reserved its rights under this Consent Decree or the MWAC Consent Decree (except for claims for failure to comply with either Consent Decree), in the event that the United States asserts rights against Settling Defendants of this Consent Decree or settling defendants under the MWAC Consent Decree coming within the scope of such reservations, or as to which Settling Defendants have reserved their rights in Paragraph 98 of this Consent Decree.

101. The Settling Defendants agree that with respect to any suit or claim for contribution brought by them for matters related to this Consent Decree they will notify the United States in writing no later than 60 days prior to the initiation of such suit or claim.

102. The Settling Defendants also agree that with respect to any suit or claim for contribution brought against them for matters related to this Consent Decree they will notify in writing the United States within 10 days of service of the complaint on them. In addition, Settling Defendants shall notify the United States within 10 days of service or receipt of any Motion for Summary Judgment and within 10 days of receipt of any order from a court setting a case for trial.

103. In any subsequent administrative or judicial proceeding initiated by the United States for injunctive relief, recovery of response costs, or other appropriate relief relating to the Site, Settling Defendants shall not assert, and may not maintain, any defense or claim based upon the principles of waiver, res judicata, collateral estoppel, issue preclusion, claim-splitting, or other

defenses based upon any contention that the claims raised by the United States in the subsequent proceeding were or should have been brought in the instant case; provided, however, that nothing in this Paragraph affects the enforceability of the covenants not to sue set forth in Section XXI (Covenants Not to Sue by Plaintiff).

#### **XXIV. ACCESS TO INFORMATION**

104. Settling Defendants shall provide to EPA, upon request, copies of all documents and information within their possession or control or that of their contractors or agents relating to activities at the Site or to the implementation of this Consent Decree, including, but not limited to, sampling, analysis, chain of custody records, manifests, trucking logs, receipts, reports, sample traffic routing, correspondence, or other documents or information related to the Work. Settling Defendants shall also make available to EPA, for purposes of investigation, information gathering, or testimony, their employees, agents, or representatives with knowledge of relevant facts concerning the performance of the Work.

##### **105. Business Confidential and Privileged Documents.**

1. Settling Defendants may assert business confidentiality claims covering part or all of the documents or information submitted to Plaintiff under this Consent Decree to the extent permitted by and in accordance with Section 104(e)(7) of CERCLA, 42 U.S.C. § 9604(e)(7), and 40 C.F.R. § 2.203(b). Documents or information determined to be confidential by EPA will be afforded the protection specified in 40 C.F.R. Part 2, Subpart B. If no claim of confidentiality accompanies documents or information when they are submitted to EPA, or if EPA has notified Settling Defendants that the documents or information are not confidential under the standards of

Section 104(e)(7) of CERCLA, the public may be given access to such documents or information without further notice to Settling Defendants.

2. The Settling Defendants may assert that certain documents, records and other information are privileged under the attorney-client privilege or any other privilege recognized by federal law. If the Settling Defendants assert such a privilege in lieu of providing documents, they shall provide the Plaintiff with the following: (1) the title of the document, record, or information; (2) the date of the document, record, or information; (3) the name and title of the author of the document, record, or information; (4) the name and title of each addressee and recipient; (5) a description of the contents of the document, record, or information; and (6) the privilege asserted by Settling Defendants. However, no documents, reports or other information created or generated pursuant to the requirements of the Consent Decree shall be withheld on the grounds that they are privileged.

106. No claim of confidentiality shall be made with respect to any data, including, but not limited to, all sampling, analytical, monitoring, hydrogeologic, scientific, chemical, or engineering data, or any other documents or information evidencing conditions at or around the Site.

#### **XXV. RETENTION OF RECORDS**

107. Until 10 years after the Performing Defendant's receipt of EPA's notification pursuant to Paragraph 53.2 of Section XIV (Certification of Completion of the Work), Performing Defendant shall preserve and retain all non-identical copies of records and documents (including records or documents in electronic form) now in its possession or control or which come into its possession or control that relate in any manner to its liability under CERCLA with respect to the



Site, provided, however, that Performing Defendant must retain, in addition, all documents and records that relate to the liability of any other person under CERCLA with respect to the Site. The Performing Defendant must also retain, and instruct its contractors and agents to preserve, for the same period of time specified above all non-identical copies of the last draft or final version of any documents or records (including documents or records in electronic form) now in its possession or control or which come into its possession or control that relate in any manner to the performance of the Work, provided, however, that the Performing Defendant (and its contractors and agents) must retain, in addition, copies of all data generated during the performance of the Work and not contained in the aforementioned documents required to be retained. Each of the above record retention requirements shall apply regardless of any corporate retention policy to the contrary.

108. At the conclusion of this document retention period, Performing Defendant shall notify the United States at least 90 days prior to the destruction of any such records or documents, and, upon request by the United States, Performing Defendant shall deliver any such records or documents to EPA. The Performing Defendant may assert that certain documents, records and other information are privileged under the attorney-client privilege or any other privilege recognized by federal law. If the Performing Defendant asserts such a privilege, they shall provide the Plaintiffs with the following: (1) the title of the document, record, or information; (2) the date of the document, record, or information; (3) the name and title of the author of the document, record, or information; (4) the name and title of each addressee and recipient; (5) a description of the subject of the document, record, or information; and (6) the privilege asserted by Performing Defendants. However, no documents, reports or other information created or generated pursuant to the requirements of the Consent Decree shall be withheld on the grounds that they are privileged.

## **XXVI. NOTICES AND SUBMISSIONS**

109. Whenever, under the terms of this Consent Decree, written notice is required to be given or a report or other document is required to be sent by one Party to another, it shall be directed to the individuals at the addresses specified below, unless those individuals or their successors give notice of a change to the other Parties in writing. All notices and submissions shall be considered effective upon receipt, unless otherwise provided. Written notice as specified herein shall constitute complete satisfaction of any written notice requirement of the Consent Decree with respect to the United States, EPA and the Performing Defendants, respectively.

**As to the United States:**

Chief, Environmental Enforcement Section  
Environment and Natural Resources Division  
U.S. Department of Justice  
P.O. Box 7611  
Washington, D.C. 20044-7611  
Re: DJ # 90-11-2-729/1

and

Director, Office of Environmental Cleanup  
United States Environmental Protection Agency  
Region 10  
ECL-113  
1200 Sixth Avenue  
Seattle, Washington

As to EPA:

Nancy Harney  
EPA Project Coordinator  
United States Environmental Protection Agency  
Region 10  
ECL - 113  
1200 Sixth Avenue  
Seattle, WA 98107

As to the Regional Financial Management Officer:

Regional Financial Management Officer  
United States Environmental Protection Agency  
Region 10  
OMP-146  
1200 Sixth Avenue  
Seattle, WA 98107

As to the State:

Russ McMillan  
Project Coordinator  
Washington Department of Ecology  
Southwest Regional Office  
P.O. Box 47600  
Olympia, WA 98504-7600

As to the Performing Defendants:

Tim M. Goodman, P.E.  
Settling Defendants' Project Coordinator  
Washington State DNR  
Aquatic Resources Division  
1111 Washington Street S.E.  
P.O. Box 47027  
Olympia, WA 98504-7027

**XXVII. EFFECTIVE DATE**

110. The effective date of this Consent Decree shall be the date upon which this Consent Decree is entered by the Court, except as otherwise provided herein.

**XXVIII. RETENTION OF JURISDICTION**

111. This Court retains jurisdiction over both the subject matter of this Consent Decree and the Settling Defendants for the duration of the performance of the terms and provisions of this

CONSENT DECREE  
FOR REMEDIAL DESIGN AND REMEDIAL ACTION AT THE  
MIDDLE WATERWAY PROBLEM AREA  
OF THE COMMENCEMENT BAY NEARSHORE  
TIDEFLATS SUPERFUND SITE

Consent Decree for the purpose of enabling any of the Parties to apply to the Court at any time for such further order, direction, and relief as may be necessary or appropriate for the construction or modification of this Consent Decree, or to effectuate or enforce compliance with its terms, or to resolve disputes in accordance with Section XIX (Dispute Resolution) hereof.

#### **XXIX. APPENDICES**

112. The following appendices are attached to and incorporated into this Consent Decree:

“Appendix A” is the 2003 ESD.

“Appendix B” is the SOW.

“Appendix C” is the description and/or map of the Middle Waterway Problem Area and the Site.

#### **XXX. COMMUNITY RELATIONS**

113. Performing Defendant shall propose to EPA its participation in the community relations plan to be developed by EPA. EPA will determine the appropriate role for the Performing Defendant under the Plan. Performing Defendant shall also cooperate with EPA in providing information regarding the Work to the public. As requested by EPA, Performing Defendant shall participate in the preparation of such information for dissemination to the public and in public meetings which may be held or sponsored by EPA to explain activities at or relating to the Site.

### **XXXI. MODIFICATION**

114. Schedules specified in this Consent Decree for completion of the Work may be modified by agreement of EPA and the Performing Defendant. All such modifications shall be made in writing.

115. Except as provided in Paragraph 14 ("Modification of the SOW or related Work Plans"), no material modifications shall be made to the SOW without written notification to and written approval of the United States, Performing Defendant, and the Court, if such modifications fundamentally alter the basic features of the selected remedy within the meaning of 40 C.F.R. 300.435(c)(2)(B)(ii). Prior to providing its approval to any modification, the United States will provide the State with a reasonable opportunity to review and comment on the proposed modification. Modifications to the SOW that do not materially alter that document, or material modifications to the SOW that do not fundamentally alter the basic features of the selected remedy within the meaning of 40 C.F.R. 300.435(c)(2)(B)(ii), may be made by written agreement between EPA and the Performing Defendant. EPA and a Funding Defendant may modify an obligation in Paragraph 9 and Section IX (Access and Institutional Controls) of such Funding Defendant by written agreement, provided the modification does not materially alter the obligation and fundamentally alter the selected remedy within the meaning of 40 C.F.R. 435(c)(2)(B)(ii).

116. Nothing in this Decree shall be deemed to alter the Court's power to enforce, supervise or approve modifications to this Consent Decree.

### **XXXII. LODGING AND OPPORTUNITY FOR PUBLIC COMMENT**

117. This Consent Decree shall be lodged with the Court for a period of not less than 30 days for public notice and comment in accordance with Section 122(d)(2) of CERCLA, 42 U.S.C. § 9622(d)(2), and 28 C.F.R. § 50.7. The United States reserves the right to withdraw or withhold its consent if the comments regarding the Consent Decree disclose facts or considerations which indicate that the Consent Decree is inappropriate, improper, or inadequate. Settling Defendants consent to the entry of this Consent Decree without further notice.

118. If for any reason the Court should decline to approve this Consent Decree in the form presented, this agreement is voidable at the sole discretion of any Party and the terms of the agreement may not be used as evidence in any litigation between the Parties.

### **XXXIII. SIGNATORIES/SERVICE**

119. Each undersigned representative of a Settling Defendant to this Consent Decree and the Assistant Attorney General for the Environment and Natural Resources Division of the Department of Justice certifies that he or she is fully authorized to enter into the terms and conditions of this Consent Decree and to execute and legally bind such Party to this document.

120. Each Settling Defendant hereby agrees not to oppose entry of this Consent Decree or the MWAC Consent Decree by this Court or to challenge any provision of this Consent Decree or the MWAC Consent Decree unless the United States has notified the Settling Defendants in writing that it no longer supports entry of the Consent Decree or the MWAC Consent Decree.

121. Each Settling Defendant shall identify, on the attached signature page, the name, address and telephone number of an agent who is authorized to accept service of process by mail on behalf of that Party with respect to all matters arising under or relating to this Consent Decree.

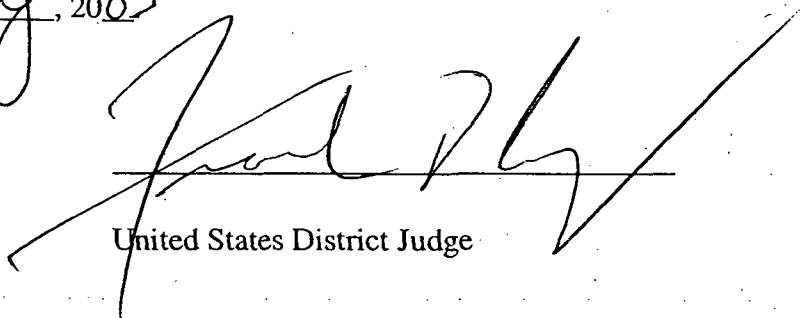
Settling Defendants hereby agree to accept service in that manner and to waive the formal service requirements set forth in Rule 4 of the Federal Rules of Civil Procedure and any applicable local rules of this Court, including, but not limited to, service of a summons.

#### XXXIV. FINAL JUDGMENT

122. This Consent Decree and its appendices constitute the final, complete, and exclusive agreement and understanding among the Parties with respect to the settlement embodied in the Consent Decree, and, with regard to the rights and obligations among and between the Settling Defendants and the settling defendants under the MWAC Consent Decree only, the MWAC Consent Decree. The Parties acknowledge that there are no representations, agreements or understandings relating to the settlement other than those expressly contained in this Consent Decree, and as noted, the MWAC Consent Decree.

123. Upon approval and entry of this Consent Decree by the Court, this Consent Decree shall constitute a final judgment between and among the United States and the Settling Defendants. The Court finds that there is no just reason for delay and therefore enters this judgment as a final judgment under Fed. R. Civ. P. 54 and 58.

SO ORDERED THIS 14 DAY OF Aug, 2002

  
United States District Judge

FOR THE UNITED STATES OF AMERICA

6.6.03  
Date

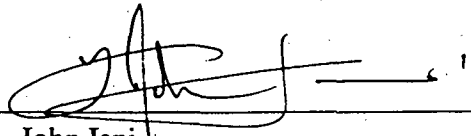
Tom Sansonetti  
Thomas L. Sansonetti  
Assistant Attorney General  
Environment and Natural Resources Division  
U.S. Department of Justice  
Washington, D.C. 20530

6/2/03  
Date

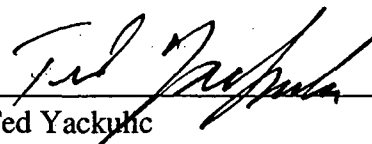
Paul Gormley  
Paul Gormley  
Environmental Enforcement Section  
Environment and Natural Resources Division  
U.S. Department of Justice  
P.O. Box 7611  
Washington, D.C. 20044-7611



11 April 2003  
Date

  
L. John Iani  
Regional Administrator, Region 10  
U.S. Environmental Protection Agency  
1200 Sixth Avenue  
Seattle, WA 98101

4/11/2003  
Date

  
Ted Yackulic  
Assistant Regional Counsel  
U.S. Environmental Protection Agency  
Region 10  
1200 Sixth Avenue  
Seattle, WA 98101

FOR COOK'S MARINE SPECIALTIES AND STUART COOK

Mar. 21, 2003  
Date

Signature: Stuart E. Cook  
Name (print): STUART E. COOK  
Title: PRESIDENT  
Address: 6020 NO PARKWAY  
TACOMA WA 98407

Agent Authorized to Accept Service on Behalf of Above-signed Party:

Name (print): STUART E. COOK  
Title: PRESIDENT  
Address: 6020 NO PARKWAY  
TACOMA WA 98407  
(253) 752-3892  
Ph. Number: \_\_\_\_\_

FOR SIMPSON TACOMA LAND COMPANY

3/21/03  
Date

Signature: R.P. Tennison  
Name (print): Raymond P. Tennison  
Title: President  
Address: 1301 Fifth Avenue, Suite 2800  
Seattle, WA 98101-2613

FOR SIMPSON TACOMA KRAFT COMPANY, LLC

3/21/03  
Date

Signature: R.P. Tennison  
Name (print): Raymond P. Tennison  
Title: President  
Address: 801 Portland Avenue, P.O. Box 2133  
Tacoma, WA 98241

Agent Authorized to Accept Service on Behalf of Above-signed Party:

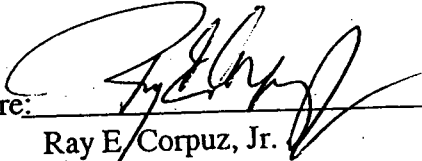
Name : Kenneth S. Weiner or  
Matthew D. Wells

Title: Attorneys  
Address: Preston Gates & Ellis, LLP  
925 Fourth Avenue, Suite 2900  
Seattle, WA 98104-1158

Ph. Number: (206) 623-7580

FOR CITY OF TACOMA

4-23-03  
Date

Signature:   
Name: Ray E. Corpuz, Jr.  
Title: City Manager  
Address: 747 Market Street  
Tacoma, WA 98402-3767

Agent Authorized to Accept Service on Behalf of Above-signed Party:

Name: Robin Jenkinson  
Title: City Attorney  
Address: City Attorney  
Office of the City Attorney  
747 Market Street  
Tacoma, WA 98402-3767  
Ph. Number: (253) 591-5781

CONSENT DECREE  
FOR REMEDIAL DESIGN AND REMEDIAL ACTION AT THE  
MIDDLE WATERWAY PROBLEM AREA  
OF THE COMMENCEMENT BAY NEARSHORE  
TIDEFLATS SUPERFUND SITE

ORIGINAL

1 THE UNDERSIGNED PARTIES enter into this Consent Decree in the matter of United  
2 States of America v. Cook's Marine Specialties, relating to the Middle  
3 Waterway within the Commencement Bay Nearshore Tideflats Superfund Site in  
4 the city of Tacoma, Pierce County, Washington:

7 **FOR CITY OF TACOMA DEPARTMENT OF**  
8 **PUBLIC UTILITIES**

9 Date: April 24, 2003

Mark Crisson  
MARK CRISSON  
Director of Utilities 3628 South 35<sup>th</sup> Street  
P.O. Box 11007  
Tacoma, WA 98411  
(253) 502-8200

12 Approved As To Form & Legally:

13 G.S. Karavitis  
14 Senior Asst. City Attorney

15  
16 Agent Authorized to Accept Service on Behalf of Above-Signed Party:

17 G.S. Karavitis  
18 Sr. Assistant City Attorney  
19 Office of the City Attorney  
20 TPU Legal Section  
21 3628 South 35th Street  
22 P.O. Box 11007  
23 Tacoma, WA 98411  
24 (253) 502-8311

25  
CONSENT DECREE  
FOR REVEDIAL DESIGN AND REMEDIAL ACTION AT THE MIDDLE  
WATERWAY PROBLEM AREA OF THE COMMENCEMENT BAY NEARSHORE  
TIDEFLATS SUPERFUND SITE

FOR WASHINGTON DEPT. OF NATURAL RESOURCES

3/24/3  
Date



Signature: [Handwritten Signature]  
Name (print): Doug SUTHERLAND  
Title: Commissioner of Public Lands  
Address: Department of Natural Resources  
1111 Washington St. SE  
P.O. Box 47001  
Olympia, WA 98504-7001


Agent Authorized to Accept Service on Behalf of Above-signed Party:

Name (print): Alexandra K. Smith  
Title: Assistant Attorney General  
Address: 1125 Washington St. SE  
P.O. Box 40100  
Olympia, WA 98504-6100  
Ph. Number: (360) 586-3755

FOR WESTERN MACHINE WORKS

3-21-03

Date

Signature: 

Name (print): R.P. SCHMITZ

Title: PRESIDENT

Address: 652 EAST 114  
TACOMA, WA 98421

Agent Authorized to Accept Service on Behalf of Above-signed Party:

Name (print): William F. Joyce

Title: ATTORNEY

Address: 1601 Fifth Avenue Suite  
2100 Seattle WA  
98101-1686

Ph. Number: (206) 447-7000

**EXPLANATION OF SIGNIFICANT DIFFERENCES  
COMMENCEMENT BAY NEARSHORE/TIDEFLATS SUPERFUND SITE  
MIDDLE WATERWAY**

**I. INTRODUCTION**

**A. Purpose**

EPA's September 30, 1989 Record of Decision (ROD) for the Commencement Bay Nearshore /Tideflats (CB/NT) Superfund site selected a remedy involving a combination of five key elements: site use restrictions (now commonly referred to as institutional controls), source control, natural recovery, sediment remedial action (i.e., confinement and habitat restoration), and monitoring, to address contaminated sediments in the waterways of the CB/NT site. In July 1997, EPA issued an Explanation of Significant Differences (ESD) which modified the PCB cleanup level. In August 2000, EPA issued an ESD which described the cleanup plans for three of the waterways in Commencement Bay—Thea Foss, Wheeler-Osgood and Hylebos— and identified the disposal sites selected to contain dredged contaminated sediments from all the waterways. In February, 2002, EPA issued an ESD to describe the specific cleanup plans for the Middle Waterway problem area and identify the manner in which the remedial methods outlined in the ROD would be applied in Middle Waterway. The purpose of this ESD is to identify an enhanced remedy that has been selected for Area C in Middle Waterway.

**B. Lead and Support Agencies**

U.S. Environmental Protection Agency (EPA) – Lead Agency for Sediment Remediation

Washington State Department of Ecology (Ecology) - Lead Agency for Source Control; Support Agency for Sediment Remediation

Puyallup Tribe of Indians - Support Agency for Sediment Remediation

**C. Statutory Authority**

Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), Section 117(c) and National Oil and Hazardous Substances Pollution Contingency Plan (NCP), Section 300.435(c)(2)(i).



## **II. BACKGROUND**

### **A. Site Name, Location and History**

The CB/NT Superfund site is located in Tacoma, Washington at the southern end of the main basin of Puget Sound. The site includes 10-12 square miles of shallow water, shoreline, and adjacent land, most of which is highly developed and industrialized. The upland boundaries of the site are defined according to the contours of localized drainage basins that flow into the marine waters. The marine boundary of the site is limited to the shoreline, intertidal areas, bottom sediments, and water of depths less than 60 feet below mean lower low water level (MLLW). The nearshore portion of the site is defined as the area along the Ruston shoreline from the Mouth of Thea Foss Waterway to Pt. Defiance. The tideflats portion of the site includes the Hylebos, Blair, Sitcum, Milwaukee, St. Paul, Middle, Wheeler-Osgood, and Thea Foss waterways; the Puyallup River upstream to the Interstate-5 bridge; and the adjacent land areas. Middle Waterway is located between Thea Foss Waterway and the Puyallup River.

EPA placed the CB/NT site on the National Priorities List (NPL) of sites requiring investigation and cleanup under EPA's Superfund Program on September 8, 1983. A remedial investigation/feasibility study (RI/FS) was completed by Ecology in 1988. EPA made the final RI/FS and Proposed Plan available for public comment in February 1989. The RI/FS evaluated contaminants detected in sediments at the CB/NT Superfund site to identify problem chemicals that pose a risk to human health and the environment. The RI/FS concluded that sediments in the nearshore/tideflats area were contaminated with a large number of hazardous substances at concentrations greatly exceeding those found in Puget Sound reference areas and which exceed sediment quality objectives (SQOs) defined for the site. Contaminated sediments in Middle Waterway have been found to contain levels of mercury, copper and PAHs that are considered harmful to humans and wildlife.

## **III. DESCRIPTION OF AND BASIS FOR THE SIGNIFICANT DIFFERENCES**

### **A. Introduction**

The CB/NT ROD sets forth a general cleanup approach for the waterways that comprise the CB/NT site and identifies, based on RI/FS sampling data, problem areas requiring response action. The August 2000 ESD identified disposal sites (two nearshore confined disposal sites and upland disposal) which would be most appropriate to safely contain dredged sediments. The February 2002 ESD for Middle Waterway better defined the area and volume of sediment exceeding the SQOs, and identified specific areas to be dredged or capped, as well as areas where natural recovery or enhanced natural recovery would be appropriate. The 2002 ESD also identified the disposal site for the contaminated sediments and refined the cost of the remedial action. None of these significant differences fundamentally altered the remedy selected in the ROD.

The February 2002 ESD for the Middle Waterway problem area identified cleanup actions to address contamination throughout the entire waterway. The selected remedies for Areas A and B included a combination of dredging and backfilling with clean material, thick capping, surficial capping with habitat mix, enhanced natural recovery, natural recovery and no action. In Area C, located at the head of the waterway (see Figure 1), the selected remedy consisted of leaving contaminated subsurface sediments undisturbed in Sediment Management Unit (SMU) 51a with enhanced natural recovery to address the surface sediment contamination in both SMUs 51a and 51b (Area C), and long-term monitoring. No action is required for SMU 52a and 52b.

During the public comment period for the draft ESD for Middle Waterway, EPA received numerous comments that did not support leaving the subsurface contamination in place in SMU 51a. Comments received from both the Washington Department of Ecology (Ecology) and the Washington Department of Natural Resources (DNR), indicated the state was not in agreement with the proposed remedy for SMU 51a. The State disagreed with EPA's analysis of the data and asked for more cleanup than EPA deemed necessary to protect human health and the environment.

EPA took these concerns into consideration before issuing the final ESD and responded to comments in a Responsiveness Summary, however, EPA's preferred remedy for SMU 51a was not revised in the final ESD. After the final ESD was issued, EPA and the state continued to have discussions about the EPA-selected remedy for SMU 51a. Ecology, in conjunction with DNR (one of the Potentially Responsible Parties [PRPs] in Middle Waterway), has now proposed to do additional removal work in SMU 51a that would be funded by the state. In accordance with Section 40 CFR 300.515(f) of the National Contingency Plan (NCP), while EPA finds that the proposed enhancement of the selected remedy is not necessary to the EPA-selected remedial action, EPA also finds that the enhanced action does not conflict nor is it inconsistent with the EPA-selected remedy. Therefore, EPA has agreed to incorporate the additional cleanup as an enhancement to the selected remedy as allowed by the NCP.

This enhancement to the selected remedy is not based on new information or a change in EPA's original interpretation of the data. It reflects the desire on the part of the state and other stakeholders for a more permanent remedy and the state's willingness to fund the entire additional cost associated with the removal of contaminated subsurface sediments in SMU 51a. The Administrative Record documenting the enhanced remedy for SMU 51a will consist of this ESD, and also incorporates by reference the Administrative Record for the February 2002 ESD.

## **B. Description of Significant Differences**

The February 2002 ESD specified enhanced natural recovery and long-term monitoring for Area C of the Middle Waterway. The enhanced remedy for Area C consists of excavation of contaminated sediments and backfilling within SMU 51a with upland disposal, rather than leaving the contaminated subsurface sediments in place. Upland disposal of excavated material will be at the Roosevelt Regional Landfill, consistent with the August 2000 ESD. This ESD

assumes that the volume of sediments excavated for disposal will not exceed 4000 cubic yards. If contamination is found at depth that exceeds this volume, it will remain in place, capped with clean material and subject to long-term monitoring. Enhanced natural recovery with long-term monitoring remains the selected remedy for SMU 51b. All work will be performed by DNR, in accordance to the Consent Decree and Statement of Work that has been negotiated for this site.

In the February 2002 ESD, EPA estimated the costs of enhanced natural recovery and long-term monitoring for Area C to be approximately \$400,000. The cost of the enhanced remedy will be \$1.6 million, approximately \$1.2 million more than the February 2002 ESD.

Changes in expected outcomes include more time to implement the remedial action (approximately one year longer than the 2002 ESD-selected remedy) and the likely need for less monitoring of the subsurface sediments.

#### **IV. PERFORMANCE CRITERIA FOR THE REMEDIAL ACTIONS**

For all the waterways in Commencement Bay, the August 2000 ESD expands on and clarifies the general cleanup approach set forth in the CB/NT ROD; it added the Endangered Species Act (ESA) as an applicable, or relevant and appropriate, requirement (ARAR) for remedial actions under the ROD; it selects two in-water disposal sites and upland disposal as acceptable disposal options; and, it provides performance criteria to be applied to the design and implementation of the selected remedial actions and mitigation projects. Those performance criteria apply to all capping, dredging, confined disposal, natural recovery, and enhanced natural recovery activities, and address subsurface contamination and mitigation. The additional requirements and clarifications supplied in the August 2000 ESD are not repeated here but are applicable to the Middle Waterway. There are no new ARARS associated with the enhanced remedy in SMU 51a.

#### **V. SUPPORT AGENCY COMMENTS**

Both the Washington Department of Ecology and the Puyallup Tribe did not support the selected remedy for Area C in the February 2002 ESD. The enhanced remedy now reflects both the Agency's and the Tribe's preferred remedial action. Ecology is working closely with DNR to design and implement the enhanced remedy.

#### **VI. AFFIRMATION OF THE STATUTORY DETERMINATION**

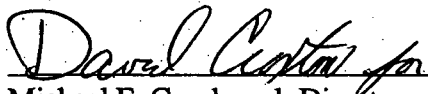
Since the enhanced remedy goes beyond the 2002 ESD remedy, this selected remedy is protective of human health and the environment, complies with Federal, State and Tribal requirements that are applicable, or relevant and appropriate to this remedial action as identified in the ROD and subsequent ESDs, and is cost-effective. This remedy utilizes permanent solutions and alternative treatment technologies to the maximum extent practicable for this site. However, because treatment was not found to be practicable, this remedy does not satisfy the statutory preference for treatment as a principle element. Because the remedy for portions of

Middle Waterway will result in hazardous substances remaining onsite above health-based levels, a review will be conducted within five years after commencement of the remedial action to ensure that the remedy continues to provide adequate protection of human health and the environment.

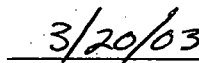
## VII. PUBLIC PARTICIPATION ACTIVITIES

This ESD will go out for public review at the same time that the Consent Decree for Middle Waterway is lodged with the court and undergoes public review and comment.

Signed:



Michael F. Gearheard, Director  
Office of Environmental Cleanup



Date

Mar 19, 2003 1:42pm cdavidson I:\CAD\Jobs\990046-Middle\_Waterway\9900460167.dwg Arc-A-Portrait

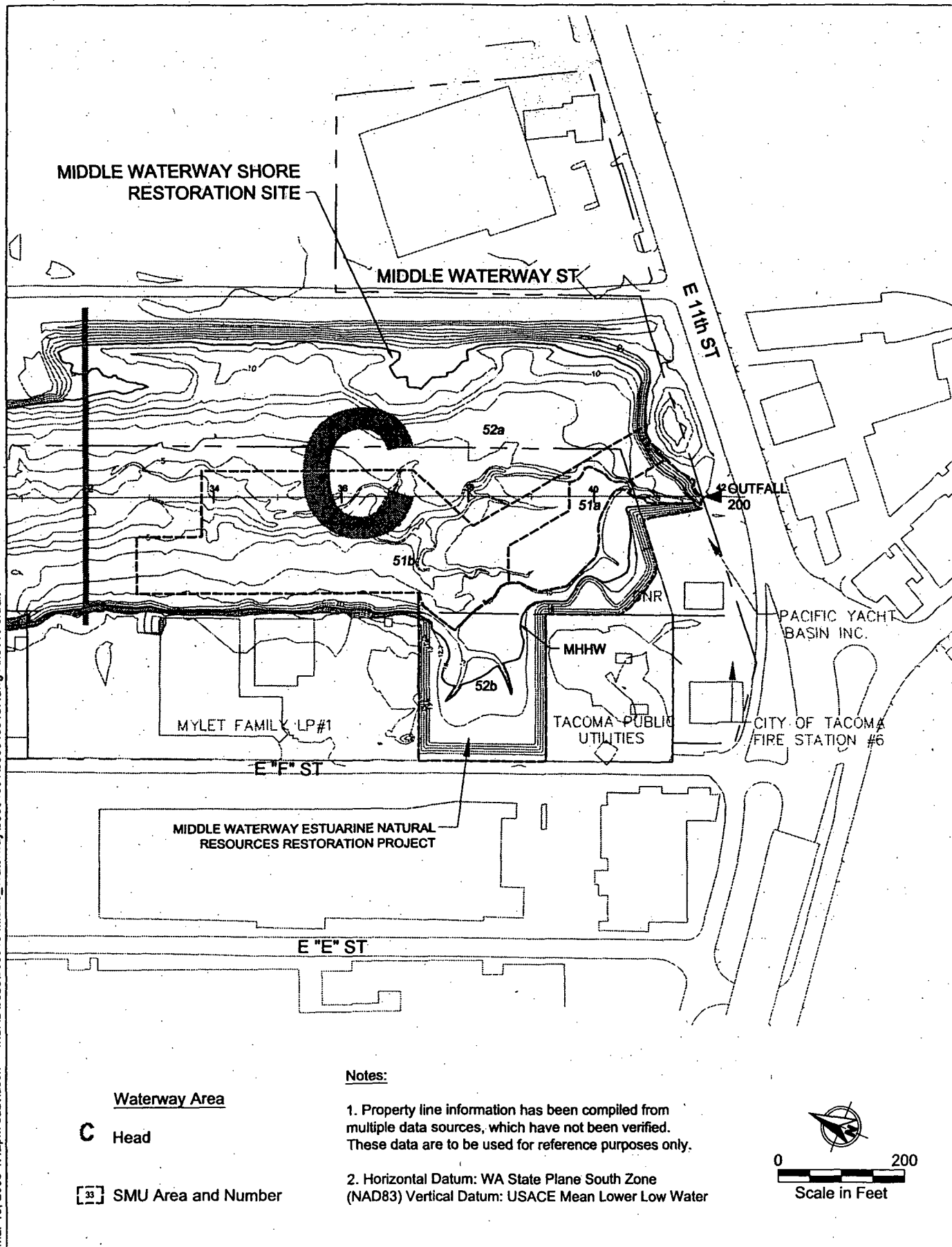
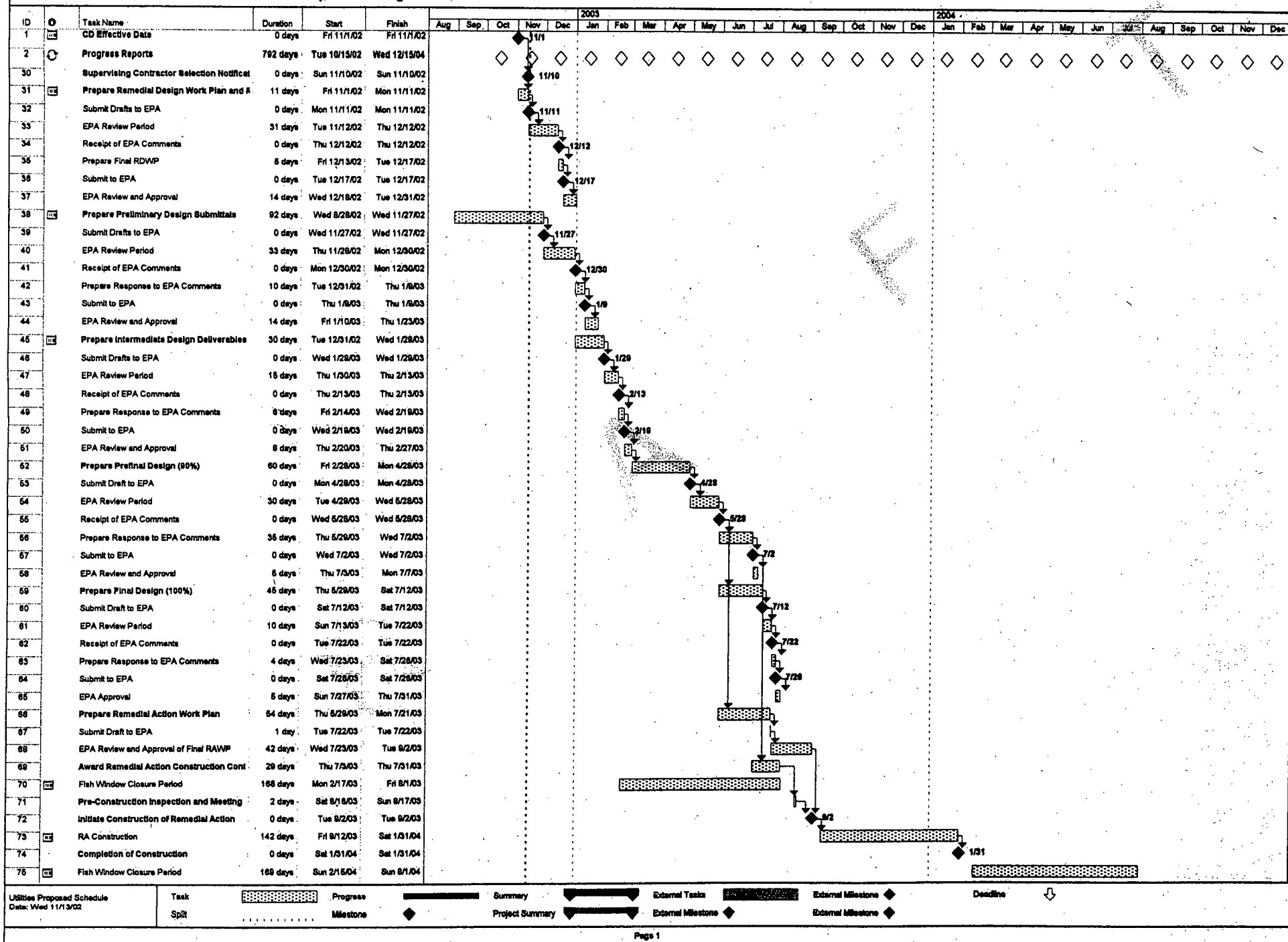


Figure 1  
Middle Waterway Problem Area  
Area C

Figure 3-2. Head of Thea Foss - Utilities Proposed Design Schedule



**STATEMENT OF WORK  
REMEDIAL DESIGN, REMEDIAL ACTION & LONG-TERM MONITORING**

**MIDDLE WATERWAY PROBLEM AREA  
AREA C**

**COMMENCEMENT BAY NEARSHORE/TIDEFLATS SUPERFUND SITE  
TACOMA, WASHINGTON**

## INDEX

- I. PURPOSE
- II. DESCRIPTION OF REMEDIAL ACTION
- III. PERFORMANCE STANDARDS
- IV. WORK TO BE PERFORMED BY RESPONDENTS
- V. RD/RA SCHEDULE OF DELIVERABLES AND MILESTONES

- Table 1 Sediment Quality Objectives
- Table 2 Biological Decision Criteria to be used in Middle Waterway RD/RA
- Table 3 RD/RA Schedule Of Deliverables And Milestones
  
- Figure 1 Area C, Middle Waterway



## **I. PURPOSE**

The purpose of this Statement of Work (SOW) is to set forth requirements for implementation of the remedial action at the Middle Waterway, Area C problem area. This SOW addresses Sediment Management Units (SMU) 51a and 51b (hereinafter collectively referred to as the "Area C"). This SOW is consistent with the Record of Decision (ROD), signed by the Regional Administrator of the United States Environmental Protection Agency (EPA), Region 10 on September 30, 1989, for the Commencement Bay Nearshore/Tideflats (CB/NT) Superfund Site (CB/NT Site), and the Explanation of Significant Differences (ESD) dated July 28, 1997, August 3, 2000 and the 2002 ESD. The 2002 ESD specifies the cleanup plan for the Middle Waterway. The 1997 ESD modified the sediment cleanup standard for polychlorinated biphenyls (PCBs). For purposes of this SOW, reference to the CB/NT ROD will include the modifications set forth in these three ESDs.

In conducting work specified in this SOW the Respondents shall follow: the 1989 ROD as modified by the 1997, 2000 and 2002 ESDs, approved pre-remedial design deliverables; approved remedial design documents; this SOW; the approved Remedial Action Work Plan; EPA's Superfund Remedial Design and Remedial Action Guidance and any additional guidance provided by EPA in submitting deliverables for implementing the remedial action at Middle Waterway Area C problem area of the CB/NT Site. Implementation of this SOW shall result in achieving the CB/NT Site cleanup objectives including the Sediment Quality Objectives in the Middle Waterway and ARARs including the State Model Toxics Cleanup Act (MTCA) and Sediment Management Standards (SMS).

Disposal sites for contaminated sediments were identified in the 2000 ESD, which provide the Respondents with suitable locations for sediment waste disposal. This SOW, however, assumes that upland disposal at the Roosevelt Regional Landfill in eastern Washington will be utilized in the implementation of this SOW. If Respondents choose to use a disposal site other than the upland regional landfill assumed by this SOW, Respondents would identify their intended disposal site in the RD documents.

## **II. DESCRIPTION OF REMEDIAL ACTION**

### **A. Key Elements of CB/NT ROD**

The CB/NT ROD selected a remedy comprised of five (5) key elements: site use restrictions (now commonly referred to as institutional controls), source control, natural recovery and enhanced natural recovery, sediment remedial action (i.e., confinement and habitat restoration), and monitoring, to address contaminated sediments in the waterways of the CB/NT Site.

Three (3) of the five (5) primary elements of the CB/NT ROD will be implemented under this SOW: sediment remedial action (including dredging/excavation, upland disposal, and any necessary habitat restoration/enhancement), enhanced natural recovery, and monitoring. Source control of hazardous substances to the Middle Waterway problem areas is not an element of this SOW. The Washington State Department of Ecology (Ecology) has been designated as the lead agency for source control at the CB/NT Site. Ecology issued its Milestone 5 report, the final administrative milestone documenting completion of source control activities for Middle Waterway, on December 8, 2000.

## **B. Cleanup Objectives**

The cleanup objectives for the remedial action, as described in Section 10 of the 1989 ROD, state, "the selected remedy is to achieve acceptable sediment quality in a reasonable time frame" (CB/NT ROD, p. 97). Habitat function and enhancement of fisheries resources are also project cleanup objectives.

### **1. Acceptable Sediment Quality in a Reasonable Time Frame**

"Acceptable sediment quality" is defined as "the absence of acute or chronic adverse effects on biological resources or significant human health risk" (CB/NT ROD, p.62). The 1989 ROD designated biological test requirements and associated sediment chemical concentrations referred to as sediment quality objectives (SQOs) to attain cleanup objectives for the CB/NT Site. The PCB SQO was subsequently updated in a 1997 ESD.

SQOs are performance standards for the CB/NT Site. Sediment quality objectives for individual chemicals specified in the ROD, as amended in the 1997 ESD, are provided in Table 1 to this SOW. Respondents may elect to evaluate sediments using the State's SMS, including biological toxicity tests, for all chemicals except PCBs to further assess biological effects predicted by the SQOs. Toxicity testing may also be used to assess the suitability of sediments for open-water disposal when chemical data predict that biological effects might be present. Relevant chemical criteria are provided in Table 1 and biological test criteria are provided in Table 2 of this SOW.

A "reasonable time frame" incorporates the ROD's selection of natural recovery and enhanced natural recovery for sediments in the CB/NT Site that are minimally contaminated and are predicted to naturally recover within 10 years from implementation of the remedial action in any given problem area. The Pre-Remedial Design Evaluation Report identified potential natural recovery areas within Area C of the Middle Waterway Problem Area. Performance monitoring of the enhanced natural recovery area is a requirement of this SOW and is discussed in more

detail in Section III.C below.

Except for enhanced natural recovery areas, the time frame for achieving SQOs shall be the end of construction of individual elements of the remedial action, as detailed in the Construction Quality Assurance Plan (CQAP) and OMMP, as appropriate, to be approved by EPA under this SOW. Determining whether SQOs have been achieved will be verified through a comparison with SQOs, and with a statistical comparison of performance monitoring data with SQOs, surrounding surface chemistry, and Sediment Remedial Action Levels (SRALs). The sediment quality monitoring and decision framework will be detailed in the OMMP.

## **2. Habitat Function and Enhancement of Fisheries Resources**

Habitat function and enhancement of fisheries resources have also been incorporated as part of the overall project cleanup objectives. For example, the physical characteristics and placement of material used for backfilling excavated areas or for enhanced natural recovery in the marine environment will be required to provide a suitable substrate and habitat for aquatic organisms that may utilize that environment. The exact scope and focus of these activities will be determined on a project-specific basis during remedial design. Consideration of habitat function and enhancement of fisheries resources is required under this SOW to meet cleanup objectives and comply with ARARs, including the Clean Water Act, Endangered Species Act, and the Puyallup Tribe of Indians Settlement Act of 1989.

## **C. Area C, Middle Waterway Problem Area**

The 1989 ROD and 2002 ESD specified enhanced natural recovery for Area C of the Middle Waterway. This SOW assumes a more extensive remedy that relies on excavation and upland disposal as the primary component of sediment cleanup remedy, combined with enhanced natural recovery for the Middle Waterway, Area C cleanup. Dredging/Excavation with upland disposal will occur in Sediment Management Unit 51a and enhanced natural recovery with long-term monitoring will occur in SMU 51b. The upland disposal of dredged/excavated material will be at the Roosevelt Regional Landfill in eastern Washington. The cleanup areas shown in Figure 1 and described in more detail in subsequent sections of this SOW, represent the cleanup plan of the 2002 ESD, which is subject to remedial design as approved by EPA and remedial action under EPA oversight under this SOW.

### **1. Sediment Management Unit 51a**

Removal of contaminated sediments is proposed for SMU 51a. Previous investigations and preliminary evaluations of remedial options for the Middle Waterway Area C Problem Area are

contained in the Final Data Evaluation Report for Middle Waterway Problem Area, dated April 9, 2001, and Final Recommended Remediation Plan, Area C for Middle Waterway Problem Area, dated April 9, 2001. Consistent with these reports and the 2002 ESD, the proposed sediment remedy for SMU 51a will be at least as protective as EPA's approved option of isolation of subsurface contamination with enhanced natural recovery for surface sediments. The removal option was one of three primary remedial options previously considered for this area.

The preliminary estimate of sediment volume to be removed was 9,300 cys in the Remedial Options Report. However, a total of 2,500 cys is used herein, based on ten cores collected in late 2002 to further refine the excavation volume required for full removal of contaminated sediment in the area of 51a. At the time of this writing, additional archived samples from the ten cores are being submitted for analytical testing to further refine the volume estimate. The final volume should be within 25% of the estimated 2,500 cys. Final excavation area and depths, volumes, removal plans and construction design shall be detailed in the design document submittals.

## **2. Sediment Management Unit 51b**

Enhanced natural recovery was identified in the 2002 ESD as the remedy for SMU 51b since sediments are marginally contaminated and with placement of a thin, overlying layer of clean material, sediments are expected to recover to SQOs within the ten (10) year time frame specified in the ROD. At the CB/NT Site, EPA considers marginally contaminated sediments as those with chemical concentrations less than the second lowest Apparent Effects Threshold (AET) value or biological test results that do not exceed the minimum cleanup level (MCUL) values under Washington State Sediment Management Standards (SMS). Numeric AET chemical concentration values are those specified in the 1989 ROD, while biological MCUL criteria are those specified in SMS regulations.

Respondents will monitor designated natural recovery areas, if any, to verify compliance with performance monitoring criteria summarized in Table 1 (including optional biological monitoring; see Table 2). Performance monitoring will be performed to verify compliance with criteria summarized in Table 1 (including optional biological monitoring; see Table 2). If monitoring data indicate that natural recovery will not or does not occur within the next 10 years, the need for enhanced natural recovery and/or active sediment remediation will be reassessed by the Respondents and EPA, consistent with the ROD and ESDs. The scope of long-term monitoring and appropriate response actions will be established in the OMMP.

## **D. Coordination with Middle Waterway Action Committee**

Middle Waterway Areas A & B are being remediated by the Middle Waterway Action Committee (MWAC) under a separate Agreed Order on Consent with EPA. Respondents will coordinate with MWAC as appropriate regarding the timing of actions and logistical considerations.

### **III. PERFORMANCE STANDARDS**

The Respondents shall adhere to the following performance standards for the design and implementation of the Middle Waterway Problem Area C remedial action. These performance standards, as stated in the 2002 ESD, or elsewhere, are consistent with the cleanup objectives and are necessary to ensure that the remedy is protective of human health and the environment, and complies with Applicable or Relevant and Appropriate Requirements (ARARs). Performance standards shall include cleanup standards, standards of control, quality criteria, and other substantive requirements, criteria, or limitations including all ARARs set forth in the 1989 ROD, 1997, 2000 and 2002 ESDs, this SOW, and/or CD, and approved deliverables under this SOW. Respondents shall address these performance standards in remedial design and shall identify additional performance standards and methods necessary to successfully implement the remedial action, including performance standards to monitor the long-term effectiveness of the remedial action and mitigation areas.

#### **A. Dredging/Excavation and Disposal**

Performance standards for dredging/excavation (removal) shall be consistent with the CB/NT ROD and ARARs including the Clean Water Act, Rivers and Harbors Act, and Endangered Species Act requirements. Under this SOW, the Middle Waterway Problem Area C will be subject to construction quality assurance and performance monitoring to ensure that the selected remedy is protective, and that applicable water quality standards are not exceeded beyond the surface water mixing zone identified for in-water activities (e.g., capping & dredging).

Section 401 of the Clean Water Act requires that both dredging/excavation and dredged material disposal (including dewatering) operations shall not violate applicable effluent or water quality standards. EPA, working with Ecology, will be responsible for certifying during remedial design that such operations will comply with this requirement. This determination allows for the designation of mixing zones within which standards may be exceeded, but beyond which applicable standards must be met. While removal and disposal operations conducted as part of a remedial action within a CB/NT problem area do not require a formal Section 401 water quality certification from Ecology, these operations must comply with the substantive requirements of such certification, including specified monitoring and reporting requirements identified by EPA.

The mixing zone utilized during removal actions and upland disposal (including temporary discharge of dewatering fluids as necessary), will require a water-quality certification from EPA. Respondents shall submit water quality monitoring plans as part of this SOW.

Respondents shall design and implement the dredging/excavation for Sediment Management Area 51a as necessary to achieve maximum benefit of removal of up to 4,000 cys.

Contaminated sediment will be dredged and disposed of in an upland regional landfill that is authorized to accept the material. As-builts of all dredged/excavated surfaces shall be provided to EPA in the Remedial Action Construction Report. Respondents shall document to EPA quantities (in-place volumes), and disposal location (upland regional landfill) for material removed from SMU 51a.

The methods for achieving the objectives for dredged/excavated areas addressed under this SOW shall be set forth in the Preliminary Design Report, the CQAP and the OMMP, as appropriate. Verification that performance standards, including SQOs, have been achieved shall be documented in the pre-final construction reports, and the Remedial Action Completion Report, as appropriate.

#### **B. Enhanced Natural Recovery**

For those areas selected for enhanced natural recovery, Respondents shall prepare: (1) monitoring plans, (2) identify triggers for initiating additional response actions if the monitoring indicates natural recovery will not succeed in the ten (10) year time frame, and (3) specify additional response actions for active remediation if monitoring indicates natural recovery will not occur by year ten (10). These elements shall be primarily addressed in the OMMP for the Site and other deliverables, as appropriate. Natural recovery monitoring will be performed until cleanup objectives are achieved.

#### **C. Conservation Measures**

Respondents shall take all appropriate measures during remedial design, construction, and site maintenance to avoid and minimize adverse impacts to the aquatic environment resulting from implementation of the remedial action. As set forth in the CB/NT Biological Assessment (BA) prepared by EPA, and in the amending ESDs, a range of conservation measures are required by EPA to ensure that critical habitat for listed species is protected by the remedial action. Conservation measures applicable to work in the Middle Waterway Problem Area C include:

- Timing restrictions for in-water work to avoid fish-critical activity periods, such that no

in-water work will occur during designated fish windows;

- Substantive compliance with water quality standards as specified in a water quality certification to be issued by EPA;
- Addition of select substrates (fish mix) as part of backfilling and enhanced natural recovery to assist in providing suitable habitat for prey items of juvenile salmonids; and
- Incorporation of specific measures (e.g., Best Management Practices such as backfilling excavated areas prior to tidal inundation) into the design, to reduce the potential for construction-related impacts to listed species or their habitats, and to minimize the potential for recontamination of Areas A and B in Middle Waterway. Specific design measures will be reviewed and approved by EPA.

#### **IV. WORK TO BE PERFORMED BY RESPONDENTS**

The scope of work for this remedial design and remedial action includes the following key components (assuming upland disposal):

- Design and implement removal and transport of excavated material to an approved upland disposal site for SMU 51a
- Design and implement thin layer cap for enhanced natural recovery in SMU 51b
- Perform construction monitoring, long-term monitoring of enhanced natural recovery area, and monitoring for effective isolation of any material left in place in 51a, as appropriate
- Perform restoration site reconstruction and replanting as necessary
- Coordinate remedial actions in Area C with other remedial and navigation activities on the waterway

To accomplish this scope of work the remedial design/remedial action shall consist of the following five (5) tasks. Respondents shall be responsible for implementing additional work elements necessary for successful implementation of the Middle Waterway Problem Area C remedial action. All plans are subject to EPA approval.

##### **Task 1: Remedial Design**

- A. Preliminary Design Document
- B. Prefinal Design Document Final
- C. Design Document

Task 2: Remedial Action Work Plan

Task 3: Remedial Action/Construction

- A. Pre-construction Inspection/Meeting
- B. RA Progress Meetings
- C. Pre-final Construction Inspection
- D. Final Construction Inspection
- E. Reports
  - 1. Remedial Action Construction Report
  - 2. Final Remedial Action Report

Task 4: Performance Monitoring and Construction Quality Assurance

Task 5: Long-term Operation, Maintenance & Monitoring

Additional details on each task are provided below. All documents, reports, and memoranda, listed in Section V of this SOW are subject to EPA review and approval.

Respondents will meet with EPA on a regular basis during remedial design development to ensure appropriate review time and resolve any design and construction related issues as they arise. Design stage elements (i.e., preliminary, prefinal, final design deliverables) will be presented and discussed with EPA during design development, culminating in the submittal of the 100% design deliverable.

### **Task 1: Remedial Design**

The remedial design is generally defined as those activities to be undertaken to develop the final plans and specifications, general provisions, special requirements, and all other technical and procurement documentation necessary to fully implement the remedial action as described in the CB/NT ROD and this SOW. Respondents shall prepare construction plans and specifications to implement the remedial actions within the Middle Waterway Problem Area C as described in the ROD and this SOW. Plans and specifications shall be submitted in accordance with the schedule set forth in Section V below. All remedial design work, including plans and specifications, shall be developed in accordance with EPA's Superfund Remedial Design and Remedial Action Guidance (OSWER Directive No. 9355.0-4A) and shall demonstrate that the remedial action shall meet all objectives of the ROD, CD, and this SOW, including all performance standards. Respondents shall meet regularly with EPA to discuss design issues.

#### **A. Preliminary Design Document**

Within thirty days (30) after the effective date, respondents shall submit a preliminary design



document and commence a series of meetings with EPA to identify and resolve potential issues. Presentation materials and technical memoranda will be used, as necessary, to support the dialogue with EPA.

Respondents shall submit the Prefinal Design deliverable when the design effort is approximately ninety (90) percent complete. The Prefinal Design submittals shall include or discuss, at a minimum, the following:

1. Summary of results of pre-design field sampling, a brief summary of the work completed, identifying key documents, and summarizing key conclusions and sampling results. The summary and key conclusions shall clearly distinguish between data previously approved by EPA and new data presented for EPA review and approval;
2. Design Report, with detailed design and access assumptions and design objectives, including but not limited to:

General Elements:

- a. Descriptions of the analyses conducted to select the design approach, including a summary and detailed justification of design assumptions;
- b. Order in which removal/backfill and ENR thin-layer capping will occur;
- c. Technical parameters and essential supporting calculations (at least one sample calculation presented for each significant or unique design calculation) upon which the design will be based, including but not limited to design requirements for each active remedy (e.g., excavation, ENR capping);
- d. Access and easement requirements, including an evaluation of the methods to access excavation areas across existing restoration sites and the most appropriate Waterway Problem Area use restrictions for each element of the remedial action to ensure long-term effectiveness;
- e. Coordination with other in-water work or navigation and commerce;
- f. Permit requirements or substantive requirements of permits;
- g. Preliminary construction schedule, including contracting strategy;
- h. Plans and protocols for excavation or ENR capping around pilings and restoration site features;

**Excavation/Backfilling (Dredging) Elements:**

- a. Methods and requirements for how excavated sediments will be handled, transported, and disposed;
- b. Proposed staging, material handling, or dewatering location(s) required;
- c. Design excavation depth and overcut allowances;
- d. Excavated material volumes;
- e. Excavation techniques, including Real Time Kinetics (RTK) precision excavation implementation;
- f. Analysis of dredge cuts to ensure contaminated side slope do not remain exposed after dredging;
- g. If appropriate, method and location for dewatering excavated sediments and disposal of associated water;
- h. Performance standards in Section III of this SOW.

**Thin-Layer Capping Elements:**

- a. Appropriate physical and chemical characteristics of materials to be used for sediment capping;
  - b. Method for identifying and testing clean source material, including acceptance criteria for such sediment;
  - c. Cap placement techniques;
  - d. Selection of cap material suitable for colonization by aquatic organisms;
  - e. Performance standards in Section III of this SOW;
3. Complete set of drawings and specifications defining the detailed design;
  4. Draft CQAP, including description/outline of proposed cleanup verification methods for remedial action construction (e.g., inspection activities and survey requirements), including compliance with ARARs. The CQAP shall also describe contractor/subcontractor qualifications, documentation and reporting, and various remedial action construction elements (e.g., excavation/backfilling, thin-layer capping, and protection/reconstruction of existing restoration sites). The CQAP will also describe water quality control measures to be specified in a Water Quality Monitoring Plan (e.g., inspection and oversight) that will occur during water quality monitoring activities to confirm that excavation/backfilling, dewatering, and thin-layer capping activities are

conducted consistent with requirements to be specified in the plans and specifications;

- a. **Water Quality Monitoring Plan.** The plan shall include the following minimum elements: monitoring schedule, sampling locations, intervals, parameters, analytical methods, key contacts, reporting requirements, daily contacts for notifications of all exceedances, result summaries, and draft and final reports.
5. Addendum to "Final Biological Assessment for Middle Waterway Problem Area of the Commencement Bay/Nearshore Tidelands Superfund Site, Tacoma, Washington" April 2001, addressing the performance standards in Section III.C., evaluating:
    - a. Changes to the effects determination for Area C based on the selection of the alternate remedy for SMU 51a.
  6. Draft Operation, Maintenance, & Monitoring Plan (OMMP) (See Task 5);
  7. Capital and Operation and Maintenance Cost Estimate (accuracy of +15 percent and -10 percent). This cost estimate shall refine the previous cost estimates to reflect the detail presented in the Draft Design;
  8. Project Schedule for the construction and implementation of the remedial action that identifies timing for initiation and completion of all critical path tasks.

## **B. Final Design**

The Final Design shall fully address all comments made to the Prefinal Design and shall include reproducible drawings and specifications suitable for bid advertisement. The final project schedule submitted as part of the Final Design shall include specific dates for major milestones and completion of the project. As described in Task 2 below, certain elements of the design will be finalized as part of the subsequent Remedial Action Work Plan deliverable.

The project plans and specifications included with the Final Design shall include detailed descriptions of sampling activities, such as water quality performance sampling. The requirements for quality assurance sampling activities including the sampling protocols, sample size, locations, frequency of testing, acceptance and rejection data sheets, problem identification

and corrective measures reports, evaluation reports, acceptance reports, and final documentation will be described. The CQAP will address inspections, surveys, oversight and reporting. Detailed procedures for sediment and water quality sampling and analysis (post-dredge confirmatory and long-term) shall be presented in the OMMP. The OMMP shall include sediment sampling operations manual, quality assurance project plans, and health and safety plans for sediment sampling activities. Existing EPA-approved Quality Assurance Project Plans (QAPPs) and other EPA-approved supporting documents may be referenced or included as appropriate.

### **Task 2: Remedial Action Work Plan**

The Respondents shall submit a single Remedial Action Work Plan which includes a detailed description of all remediation and construction activities, including how those construction activities are to be implemented by Respondents and coordinated with EPA (e.g., site-monitoring, material staging and handling). When describing implementation of the remedial action, Respondents shall identify discrete elements of the remedial action for purposes of monitoring construction activities as they occur. The RA Work Plan shall include a project schedule for each major activity and submission of deliverables generated during the remedial action. The project schedule submitted in the RA Work Plan shall clearly describe the interrelationship between various discrete portions of the remedial and removal actions within this SOW.

Respondents shall submit the following deliverables with submission of the Remedial Action Work Plan (unless previously submitted and approved by EPA):

1. Final Construction Quality Assurance Plan (see Task 4 for detail);
2. Final Contractor submittals (e.g., Water Quality Monitoring Plan, Health and Safety Plan and Quality Assurance Project Plan addenda as appropriate) for remedial action construction activities;
3. Final OMMP (see Task 5).

### **Task 3: Remedial Action Construction**

The Respondents shall implement the remedial action as detailed in the approved Final Design and Final Remedial Action Work Plan. The following activities shall be completed in constructing the remedial action.

**A. Pre-construction Inspection and Meeting**

The Respondents shall participate with EPA and the State in a pre-construction inspection and meeting to:

1. Review methods for documenting and reporting inspection data, and compliance with specifications and plans including methods for processing design changes and securing EPA review and approval of such changes as necessary;
2. Review methods for distributing and storing documents and reports;
3. Review work area security and safety protocol;
4. Demonstrate the construction management is in place, and discuss any appropriate modifications of the construction quality assurance plan to ensure that Site-specific considerations are addressed; and
5. Conduct a Site walk-about to verify that the design criteria, plans, and specifications are understood and to review material and equipment storage locations.

All inspections and meetings shall be documented by Respondent's designated contact and minutes shall be transmitted to all parties within seven (7) working days of the inspection or meeting.

**B. RA Briefings and Progress Meetings**

Respondents shall conduct RA briefings and progress meetings on a regular basis throughout the RA. Briefings shall be held on a weekly basis to discuss issues such as the results of ongoing water quality monitoring and field changes unless EPA and Respondents agree to a less frequent schedule. Progress meetings shall be held at least monthly unless EPA and Respondents agree to a less frequent schedule. Progress meetings shall be scheduled on the same day that weekly briefings occur, thus eliminating the need for additional briefings during that week. At a minimum, Respondents shall address the following at progress meetings:

- General progress of construction with respect to RA schedule;
- Problems encountered and associated action items;
- Pending design, personnel or schedule changes requiring EPA review and approval;

- Results of any RA verification sampling and associated decisions and action items.

### **C. Prefinal Construction Inspections**

Within thirty days (30) after Respondents make preliminary determinations that construction is complete for each discrete element of the remedial action, as defined in the Final Remedial Action Work Plan, the Respondents shall notify EPA and the State for the purposes of conducting a prefinal inspection.

The prefinal inspections shall consist of a walk-through inspection of the entire completed remedial action element with EPA. The inspection is to determine whether the project element is complete and consistent with the contract documents and the Remedial Action Work Plan, to review compliance with the CQAP, and to review field changes and change orders, and verify that SQOs have been achieved. The Respondents shall certify that each discrete element of the remedy has been constructed to meet the purpose and intent of the specifications. Respondents shall complete re-testing where deficiencies are revealed. Within seven (7) days of the inspection, a prefinal construction inspection letter/report shall be submitted to EPA. The prefinal construction inspection report shall include a summary of the major CQAP results and field changes, as well as minutes from the inspection. The prefinal inspection report shall outline the outstanding construction items, actions required to resolve items, completion date for these items, and a proposed date for final inspection.

### **D. Final Construction Inspections**

Within thirty days (30) after completion of any work identified in the prefinal inspection reports, the Respondents shall notify EPA and the State for the purposes of conducting a final inspection of each discrete remedial action element. The final inspection shall consist of a walk-through inspection of each discrete element of the remedial action by EPA and the Respondents. The prefinal inspection reports shall be used as a checklist with the final inspection focusing on the outstanding construction items identified in the prefinal inspections. Confirmation shall be made that outstanding items have been resolved. Resolution of all outstanding items should be documented in a Final Construction Letter/Report within thirty days (30) of the final inspection.

### **E. Reports**

Respondents shall follow EPA guidance for preparing Remedial Action Reports described in "Close Out Procedures for National Priorities List Sites," EPA 540-R-98-016, OSWER Directive 9320.2-09A-P, PB98-963223, January 2000 in submitting the following reports.

### **1. Remedial Action Construction Report**

The Respondents shall submit this report when the construction is complete for all discrete remedial action elements, but before all performance standards have been attained (i.e., prior to achieving natural recovery).

Within thirty days (30) of the last successful final construction inspection, Respondents shall submit a Remedial Action Construction Report. In the report, a registered professional engineer and the Respondents' Project Coordinator shall state that the remedial action has been constructed in accordance with the design and specifications. The written report shall include as-built drawings signed and stamped by a professional engineer, and other supporting documentation to demonstrate the CQAP was followed. The report shall contain the following statement, signed by a responsible corporate official of the Respondents' Project Coordinator:

"To the best of my knowledge, after thorough investigation, I certify that the information contained in or accompanying this submission is true, accurate, and complete. I am aware there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations."

### **2. Remedial Action Completion Report**

The Respondents shall submit this report after construction is complete and all performance standards have been attained (including performance standards for natural recovery as applicable), but where OMMP requirements will continue to be performed.

Within thirty days (30) of a successful demonstration that all performance standards have been attained, Respondents shall submit a Remedial Action Completion Report. In the report, a registered professional engineer and a responsible official or the Respondents' Project Coordinator shall state the remedial action has been completed in full satisfaction of the requirements of the CD. The written report shall include a summary of all information (e.g., long-term monitoring data) demonstrating performance standards not met (e.g., natural recovery) in the Remedial Action Construction Report have been obtained. The report shall also include documentation not previously submitted with the Remedial Action Construction Report verifying that performance standards, including SQO cleanup objectives, have been attained. The report shall contain the following statement, signed by a responsible corporate official of or the Respondents' Project Coordinator:

"To the best of my knowledge, after thorough investigation, I certify that the

information contained in or accompanying this submission is true, accurate, and complete. I am aware there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations."

#### **Task 4: Performance Monitoring and Construction Quality Assurance**

Performance monitoring shall be conducted to ensure that all performance standards are met, including cleanup verification methods and methods for determining compliance with performance standards and ARARs. The CQAP shall address performance standards related to the remedial action construction (e.g., inspections, surveys, oversight and reporting). Other confirmatory sediment sampling to demonstrate long-term achievement of SQOs throughout the Middle Waterway Problem Area C and other long-term performance standards to be achieved after remedial action construction is completed (e.g., achievement of SQOs in enhanced natural recovery areas) shall be addressed in the OMMP. The post-construction sediment sampling results conducted under the CQAP will become the baseline for the OMMP described in Task 5. Existing EPA-approved QAPPs and other supporting documents may be referenced as appropriate.

The documents listed in this section must be prepared and submitted consistent with Section III of this SOW. The required content of each of these documents is described below.

##### **A. Construction Quality Assurance Plan**

Respondents shall submit in accordance with the schedule in section V of this SOW, a Construction Quality Assurance Plan (CQAP) that describes the specific components of the performance methods and quality assurance program that shall ensure that the completed project meets or exceeds performance standards and design criteria, and the project plans and specifications, including achievement of SQOs as defined in this SOW. As part of the CQAP, Respondents shall propose a sampling approach for verifying that SQOs have been achieved in SMU 51b. The draft CQAP shall be submitted as described above in Task 1, A and the final CQAP shall be submitted with the RA Work Plan. Consistent with preparation of discrete elements of the remedial design, Respondents may submit a separate CQAP for discrete portions of the remedial action to facilitate contracting the remedial and removal actions under this SOW. The CQAP(s) shall contain, at a minimum, the following elements:

1. Responsibilities and authorities of all organizations and key personnel involved in the design and construction of the remedial action, including EPA and other agencies.



2. Qualifications of the Construction Quality Assurance (CQA) Official. Establish the minimum training and experience of the CQA Officer and supporting inspection personnel.
3. Performance Standards and Methods. Describe all performance standards and methods necessary to ensure implementation of the remedial action construction, including mitigation as appropriate, in compliance with ARARs and identified Site-specific performance standards. Performance monitoring requirements shall be stated to demonstrate that best management practices have been implemented for dredging operations, transportation of dredged material, and proper thin-layer cap placement techniques.
4. Inspection and Verification activities. Establish the observations and tests that will be required to monitor the construction and/or installation of the components of the remedial action. The plan shall include the general scope and frequency of each type of inspection to be conducted. Inspections shall be required to measure compliance with environmental requirements and ensure compliance with all health and safety procedures.
5. Documentation. Reporting requirements for CQA activities shall be described in detail in the CQA plan. This shall include such items as daily summary reports, inspection data sheets, problem identification and corrective measures reports, design acceptance reports, and final documentation/storage. A description of the provisions for final storage of all records consistent with the requirements of the CD shall be included.
6. Field Changes. Describe procedures for processing design changes and securing EPA review and approval of such changes to ensure changes conform to performance standards, ARARs, requirements of this SOW, are consistent with Cleanup Objectives and are protective of human health and the environment.
7. Final Reporting. Identify all final CQAP documentation to be submitted to EPA in the Remedial Action Construction Report, or other deliverables and submissions.

Detailed procedures for water quality sampling and analysis described in the CQAP shall be

presented in the plans and specifications, as appropriate. Existing EPA-approved QAPPs and other supporting documents may be referenced or included, as appropriate.

## **B. Quality Assurance Project Plans**

For a particular sampling event Respondents may propose to use an existing EPA-approved QAPP. The Respondents will identify whether any changes or additions are needed for each sampling effort. Regardless of whether Respondents utilize existing EPA-approved QAPPs or submit a new QAPP for a unique sampling event, the QAPP shall be consistent with the requirements of the EPA Contract Lab Program (CLP) for laboratories proposed outside the CLP. The QAPP shall at a minimum include:

### **Project Description**

- Facility Location History
- Past Data Collection Activity
- Project Scope
- Sample Network Design
- Parameters to be Tested and Frequency
- Project Schedule

### **Project Organization and Responsibility**

#### **Data Management Plan**

- Describe tracking, sorting, retrieving data
- Identify software for data storage,
- Minimum data requirements & data format
- Data backup procedures
- Submission of data in format(s) acceptable to EPA

#### **Quality Assurance Objective for Measurement Data**

- Level of Quality Control Effort
- Accuracy, Precision, and Sensitivity of Analysis
- Completeness, Representativeness and Comparability

#### **Sampling Procedures**

- Sample Custody
- Field Specific Custody Procedures
- Laboratory Chain-of-Custody Procedures

**Calibration Procedures and Frequency**

- Field Instruments/Equipment
- Laboratory Instruments

**Analytical Procedures**

- Non-contract Laboratory Program Analytical Methods
- Field Screening and Analytical Protocol
- Laboratory Procedures

**Internal Quality Control Checks**

- Field Measurements
- Laboratory Analysis

**Data Reduction, Validation, and Reporting**

- Data Reduction
- Data Validation
- Data Reporting

**Performance System Audits**

- Internal Audits of Field Activity
- Internal Laboratory Audit
- External Field Audit
- External Laboratory Audit

**Preventative Maintenance**

- Routine Preventative Maintenance Procedures and Schedules
- Field Instruments/Equipment
- Laboratory Instruments

**Specific Routine Procedures to Assess Data Precision, Accuracy, and Completeness**

- Field Measurement Data
- Laboratory Data

**Corrective Action**

- Sample Collection/Field Measurements
- Laboratory Analysis

**Quality Assurance Reports to Management**

### **C. Health and Safety Plan**

The Respondents, or their contractors, shall develop and submit in accordance with the schedule in Section V of this SOW, health and safety plans which are designed to protect on-site personnel and area residents from physical, chemical, and all other hazards posed by this remedial action. The safety plan shall develop the performance levels and criteria necessary to address the following areas:

- Facility description
- Personnel
- Levels of protection
- Safe work practices and safeguards
- Medical surveillance
- Personal protective equipment
- Personal hygiene
- Decontamination—personal and equipment
- Site work zones
- Contaminant control
- Contingency and emergency planning, including SPCC
- Logs, reports, and record keeping

The safety plan(s) shall follow EPA guidance and all OSHA requirements as outlined in 29 C.F.R. 1910 and 1926. Respondents may utilize existing Health and Safety Plan project documents (e.g., pre-remedial design HASP) or other company/contractor HASPs provided that Respondents demonstrate the HASP has been modified, as necessary, or otherwise sufficiently addresses the activities covered by this SOW.

### **D. Field Sampling Plan**

Respondents shall develop and submit in accordance with the schedule in Section V of this SOW, field sampling plan(s) (or equivalent documents/appendices) as described in "Guidance for Conducting Remedial Investigations and Feasibility Studies under CERCLA", October 1988. The Field Sampling Plan(s) will supplement the QAPP and address all sample collection activities under this SOW.

### **Task 5: Operation, Maintenance & Monitoring**

Respondents shall submit in accordance with the schedule in Section V of this SOW for EPA

approval a single post-remedial action Operation, Maintenance, & Monitoring Plan (OMMP) covering all remedial actions in the in the Middle Waterway Problem Area C. The OMMP covers long-term operation, maintenance and monitoring activities after all elements of the remedial actions have been constructed. The objectives of the OMMP shall include:

- Confirmation that performance standards are achieved by the remedial action;
- Confirmation that exposure of subsurface contamination has not occurred through physical processes such (e.g., through) storms or ship scour;
- Confirmation of natural recovery in designated areas within 10 years following completion of remedial actions in adjacent areas;
- Evaluation of long-term effectiveness of habitat restoration reconstruction.

The Respondents shall prepare an OMMP to cover both implementation and long-term maintenance and monitoring of the remedial action. A draft OMMP shall be submitted with the Prefinal Design. The final OMMP shall be submitted to EPA no later than the Remedial Action Work Plan submittal. The final OMMP shall address all comments made to the draft OMMP and will be subject to EPA approval. After results for each monitoring event are reported, the final OMMP will be reviewed and revised as necessary, under EPA direction and approval. Types of monitoring may include:

- Bathymetry
- Sediment chemistry
- Confirmatory biological analyses (i.e., sediment bioassays or benthic in faunal abundance)

Respondents shall propose the appropriate monitoring elements necessary to achieve the specified monitoring objectives in this SOW for the remedial action. A rationale for the proposed monitoring actions shall also be included. However, long-term monitoring to ensure the effectiveness of the remedial action, including mitigation, will continue as long as contaminated sediments are left in place.

The OMMP shall be composed of the following elements:

1. Description of normal operation and maintenance:
  - a. Description of tasks to achieve each monitoring objective;
  - b. Description of tasks for maintenance;
  - c. Schedule showing frequency of each OMMP task
  - d. Summary table of OMMP activities for all activities

2. Description of routine monitoring and laboratory testing:
  - a. Description of monitoring tasks;
  - b. Description of required data collection (including sample type, number, location and frequency), laboratory tests, and their interpretation;
  - c. Required quality assurance and quality control, SAP & HSP (or addenda);
  - d. Schedule of monitoring frequency; and
  - e. Description of verification sampling procedures if SQOs or performance standards are exceeded in routine monitoring.
3. Corrective Action:
  - a. Description of corrective action to be implemented in the event that cleanup or performance standards are not met (e.g., if exceedances of SQOs are detected, identify additional sampling and/or analysis to be conducted by Respondents to identify appropriate response actions, if any); and
  - b. Schedule for implementing these corrective actions.
4. Description of procedures for a request to EPA to reduce the frequency of or discontinue monitoring.
5. Records and reporting mechanisms required:
  - a. Laboratory records;
  - b. Records for long-term monitoring costs;
  - c. Documentation to comply with CERCLA 5-year Review Reporting Requirements;
  - d. Reports to State or Federal Agencies.

The final OMMP shall include detailed descriptions of all sampling activities, such as sediment quality monitoring, and will establish requirements for quality assurance sampling activities including the sampling protocols, sample size, locations, frequency of testing, acceptance and rejection data sheets, problem identification and corrective measures reports, evaluation reports, acceptance reports, and final documentation. The OMMP shall include sediment sampling operations manual, quality assurance project plans, and health and safety plans for sediment sampling activities. Existing EPA-approved QAPPs and other EPA-approved supporting documents may be referenced or included as appropriate.

## V. RD/RA SCHEDULE OF DELIVERABLES AND MILESTONES

The schedule for submission of major deliverables to EPA is described below. If the date of submission of any item or notification required by this SOW occurs on a weekend or federal holiday, the date of submission of that item or notification shall be the next working day following the weekend or holiday.

Table 3 RD/RA Schedule of Deliverables and Milestones

Item #	Milestone	Description
1	<u>Preliminary Design Document</u> To allow EPA review and evaluation of the Area C remedial Design, presentation with adequate supporting documentation will start with Preliminary Design and proceed through (with delivery of) 90% Design for SMUs 51a and 51b	NLT 30 days after effective date of CD, prepare and submit preliminary design document.
2	Pre Final Design and supporting draft documents, draft CQAP, draft OMMP, and draft BA Addendum, outline of plans & specifications.	Prepare and submit Prefinal Design within 45 days of approval of the preliminary design.
3	Design Dialogue – <u>Final Design</u>	Thirty days after approval of Prefinal Design
4	RA Work Plan, including final CQAP, Final OMMP, Plans & specifications and supporting documents	30 days after EPA approval of final design
5	Award RA Construction Contract	NLT 110 days after EPA approval of final design
6	Notification of RA Start	30 days prior to start of construction
7	Pre-Construction Inspection Meeting	15 days after award
8	Initiate Construction	NLT 30 days after award
9	RA Construction	As required in approved RA Work Plan
10	Prefinal Construction Inspection/Meeting	NLT 30 days after completion of construction

11	Prefinal Construction Inspection Letter/Report(s)	7 days after prefinal construction inspection for each discrete element of the remedial action
12	Final Construction Inspections/Meeting	NLT 30 days after completion of work identified each in prefinal construction inspection letter/report
13	Final Construction Letter/Reports(s)	NLT 30 days after each final inspection/meeting
14	RA Construction Report	NLT 30 days after last prefinal construction inspection/meeting
15	RA Completion Report	NLT 30 days after demonstrating Remedial Action Objectives, including SQOs for natural recovery areas, have been attained



**Table 1 Sediment Quality Objectives**

Chemical	Sediment Quality Objective <sup>1</sup>
<b>Metals (mg/kg dry weight; ppm)</b>	
Antimony	150 <sup>A</sup>
Arsenic	57 <sup>B</sup>
Cadmium	5.1 <sup>B</sup>
Copper	390 <sup>L</sup>
Lead	450 <sup>B</sup>
Mercury	0.59 <sup>L</sup>
Nickel	>140 <sup>A,B</sup>
Silver	6.1 <sup>A</sup>
Zinc	410 <sup>B</sup>
<b>Organic Compounds (µg/Kg dry weight; ppb)</b>	
<b>Low Molecular Weight Polycyclic Aromatic Hydrocarbons (LPAH)</b>	
Naphthalene	5,200 <sup>L</sup>
Acenaphthylene	2,100 <sup>L</sup>
Acenaphthene	1,300 <sup>A,B</sup>
Fluorene	500 <sup>L</sup>
Phenanthrene	540 <sup>L</sup>
Anthracene	1,500 <sup>L</sup>
2-Methylnaphthalene	960 <sup>L</sup>
	670 <sup>L</sup>
<b>High Molecular Weight PAH (HPAH)</b>	
Fluoranthene	17,000 <sup>L</sup>
Pyrene	2,500 <sup>L</sup>
Benz(a)anthracene	3,300 <sup>L</sup>
Chrysene	1,600 <sup>L</sup>
Benzo(a)pyrene	2,800 <sup>L</sup>
Indeno (1,2,3-cd)pyrene	3,600 <sup>L</sup>
Dibenz (a,h)anthracene	1,600 <sup>L</sup>
Benzo(ghi)perylene	690 <sup>L</sup>
	230 <sup>L</sup>
	720 <sup>L</sup>
<b>Chlorinated Organic Compounds</b>	
1,3-Dichlorobenzene	170 <sup>A,L,B</sup>
1,4-Dichlorobenzene	110 <sup>B</sup>
1,2-Dichlorobenzene	50 <sup>L,B</sup>
1,2,4-Trichlorobenzene	51 <sup>A</sup>
Hexachlorobenzene (HCB)	22 <sup>B</sup>
Total Polychlorinated Biphenyls (PCBs)	300 <sup>*</sup>

Chemical	Sediment Quality Objective <sup>1/</sup>
<b>Phthalates</b>	
Dimethyl phthalate	160 <sup>L</sup>
Diethyl phthalate	200 <sup>B</sup>
Di- <i>n</i> -butyl phthalate	1,400 <sup>AL</sup>
Butyl benzyl phthalate	900 <sup>AB</sup>
Bis(2-ethylhexyl)phthalate	1,300 <sup>B</sup>
Di- <i>n</i> -octyl phthalate	6,200 <sup>B</sup>
<b>Phenols</b>	
Phenol	420 <sup>L</sup>
2-Methylphenol	63 <sup>AL</sup>
4-Methylphenol	670 <sup>L</sup>
2,4-Dimethylphenol	29 <sup>L</sup>
Pentachlorophenol	360 <sup>A</sup>
<b>Miscellaneous Extratable Compounds</b>	
Benzyl alcohol	73 <sup>L</sup>
Benzoic acid	650 <sup>LB</sup>
Dibenzofuran	540 <sup>L</sup>
Hexachlorobutadiene	11 <sup>B</sup>
N-nitrosodiphenylamine	28 <sup>B</sup>
<b>Volatile Organic Compounds</b>	
Tetrachloroethene	57 <sup>B</sup>
Ethylbenzene	10 <sup>B</sup>
Total xylenes	40 <sup>B</sup>
<b>Pesticides</b>	
P,P'-DDE	9 <sup>B</sup>
P,P'-DDD	16 <sup>B</sup>
P,P'-DDT	34 <sup>B</sup>

1/ Lowest apparent effects threshold among amphipod, oyster, and benthic infauna:

A - Amphipod mortality bioassay.

L - Oyster larvae abnormality bioassay.

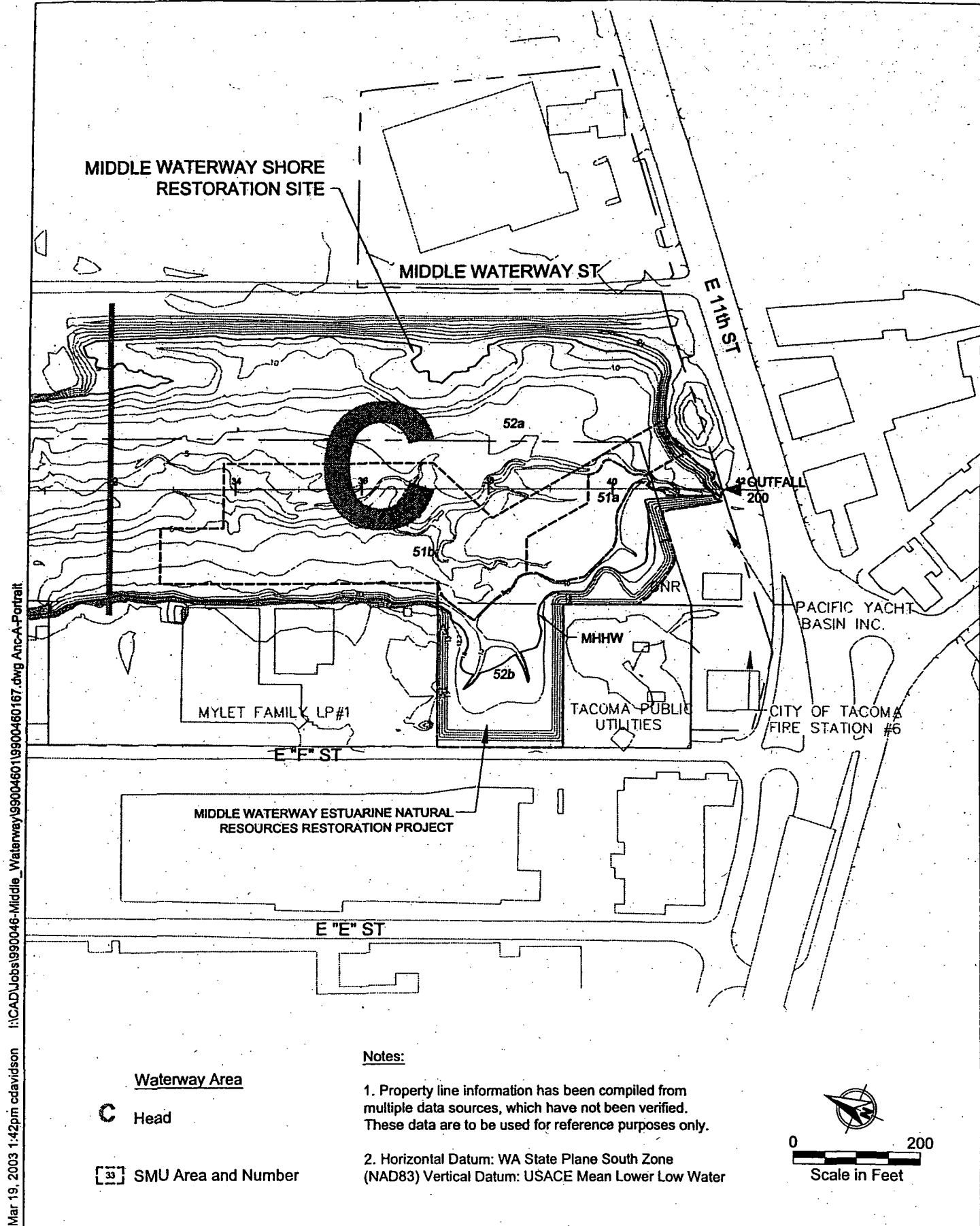
B - Benthic infauna.

\* - Sediment Quality Objective is 300 ppb, and the Sediment Remedial Action Level is 450 ppb, using the PSDDA summing method as set forth in the July 28, 1997 Explanation of Significant Differences (EPA, 1997).

**Table 2 Biological Testing Decision Criteria - Minor Adverse Biological Effect Threshold**

Biological Test	Reference Area/Control Performance Criteria <sup>1/</sup>	Decision Criteria
Amphipod	Control sediment <10% mortality; reference sediment <25% mortality	The test sediment has a higher (statistically significant, t test, $p \leq 0.05$ ) mean mortality than the reference sediment and the test sediment mean mortality is greater than a value represented by the reference sediment mean mortality plus thirty percent.
Larval	Seawater control <30% combined abnormality and mortality	The test sediment has a mean survivorship of normal larvae that is less (statistically significant, t test, $p \leq 0.1$ ) than the mean normal survivorship in the reference sediment and the test sediment mean normal survivorship is less than seventy percent of the mean normal survivorship in the reference sediment (i.e., the test sediment has a mean combined abnormality and mortality that is greater than or equal to thirty percent relative to time-final in the reference sediment).
Juvenile Polychaete	Control sediment <10% mortality and $\geq 0.72$ mg/day growth; reference sediment individual growth rate $\geq 80\%$ control individual growth rate	The test sediment has a mean individual growth rate of less than fifty percent of the reference sediment mean individual growth rate and the test sediment mean individual growth rate is statistically different (t test, $p \leq 0.05$ ) from the reference sediment mean individual growth rate.

1/ The biological tests shall not be considered valid unless test results for the appropriate control and reference sediment samples meet the performance standards.



APPENDIX C

RESERVATION OF ACCESS EASEMENT AND RESTRICTION ON USE

I. RECITALS

WITNESSETH:

WHEREAS, Grantor is the owner of real property located in \_\_\_\_\_ County, Washington and legally described in ATTACHMENT \_\_\_\_\_ hereto (the "Property");

WHEREAS, the Property is part of the \_\_\_\_\_ of the \_\_\_\_\_ Superfund Site ("\_\_\_\_\_" or "Site") which the United States Environmental Protection Agency ("EPA") placed on the National Priorities List, 40 C.F.R. Part 300, Appendix B, as published in the Federal Register on \_\_\_\_\_;

WHEREAS, in a Consent Decree by and between the United States of America and \_\_\_\_\_, dated \_\_\_\_\_, the parties agreed to conduct a Remedial Action, as defined in the Consent Decree, but as used herein to include also Operation, Maintenance and Monitoring (OM&M) as defined in the Consent Decree (herein together "Remedial Action"), that is generally described as follows :

WHEREAS, the parties have agreed: (a) to reserve to the Grantor a permanent right of access over the Property for the purpose of implementing, facilitating, and monitoring the scope of the Remedial Action; and (b) to impose on the Property use restrictions as covenants that the parties intend to run with the land and to be binding upon the successors, transferees and assigns of the Grantee for the purpose of implementing, facilitating, and monitoring the scope of the Remedial Action;

WHEREAS, Grantor intends to cooperate fully with Grantee and EPA in the implementation of all response actions at the Site.

## II. RESTRICTIONS AND RESERVATIONS.

1. Purpose: It is the purpose of these restrictions and reservations to ensure that the Property will not be used in a manner that will cause a failure of the Remedial Action and to reserve and retain for the Grantor the right to implement, facilitate, and monitor the Remedial Action to assure that the Property will be used only for purposes which are compatible with the Remedial Action.

2. Restrictions on Use: Grantee, on behalf of itself, its successors and assigns, in consideration of this Reservation of Access Easement and Restriction on Use hereby covenants that use of the Property shall be restricted as follows:

- a. Unless approved by EPA, no action shall be taken or suffered that would (i) interfere with or adversely affect the implementation, integrity or protectiveness of the remedial measures to be performed pursuant to the Consent Decree; (ii) expose contaminated sediments left in place in the Middle Waterway to the environment or marine organisms; or (iii) disturb the integrity or effectiveness of any surface cap on the Property where the disturbance causes the release or threatened release to the environment of hazardous substances in excess of Site cleanup standards regardless of whether such cap was established as a requirement of the ROD.
- b. At least 30 days prior to any conveyance of a title interest in the Property, the owner of the Property shall give written notice to the grantee of the Consent Decree and of the access obligations and use restrictions therein and shall give written notice to EPA of the proposed conveyance, including the name and address of the grantee, and the date on which notice of the Consent Decree and the this Reservation of Access Easement and Restriction on Use were given to the grantee.

The parties intend these restrictions to run with the land and to be binding upon the Grantee and its successors, transferees, and assigns for the benefit of Grantor.

3. Reservation of Environmental Protection Easement: Grantor hereby reserves and retains for itself and its successors and assigns, a non-exclusive, perpetual easement to enter on the Property at reasonable times and in a reasonable manner. The

purposes of such access are to conduct any activity relating to the Consent Decree, including but not limited to the following activities:

- a. Implementing the Remedial Action as defined in the Consent Decree;
- b. Verifying any data or information submitted to the EPA pursuant to the Consent Decree;
- c. Verifying that no action is being taken on the Property in violation of the terms of this Reservation of Access Easement and Restriction on Use; and
- d. Monitoring the Remedial Action and conducting investigations related to the Remedial Action including, without limitation, sampling of air, water, sediments, soils, and specifically, without limitation, obtaining split or duplicate samples.

4. No Public Access and Use: No right of access or use by the general public to any portion of the Property is intended by the parties or is conveyed by this Reservation of Access Easement and Restriction on Use.

5. Enforcement: The Grantor hereby reserves and retains for itself and its successors, and assigns an irrevocable, permanent, and continuing right to enforce the terms of this Reservation of Access Easement and Restriction on Use by resort to specific performance or legal process. All remedies available hereunder shall be in addition to any and all other remedies at law or in equity. Enforcement of the terms of this instrument shall be at the discretion of the Grantor, and any forbearance, delay or omission to exercise its rights under this instrument shall not be deemed to be a waiver by the Grantor of such term or any subsequent breach of the same or any other term, or of any of the rights of the Grantor under this Reservation of Access Easement and Restriction on Use.

6. Third Party Beneficiary: The Grantor on behalf of itself and its successors and assigns, and the Grantee on behalf of itself and its successors, transferees, and assigns, hereby agree that the EPA shall be third party beneficiary of all the benefits and rights reserved and retained by the Grantor in this Reservation of Access Easement and Restriction on Use.

7. Waiver of Certain Defenses: Grantee and its successors, transferees, and assigns hereby waive any defense of laches, estoppel, or prescription.

8. Covenants: Grantor hereby covenants to and with the

Grantee and its assigns, that the Grantor has a good and lawful right and power to reserve and retain this Reservation of Access Easement and Restriction on Use.

9. Notices: Any notice, demand, request, consent, approval, or communication that either party desires or is required to give the other under this Reservation of Access Easement and Restriction on Use shall be in writing and shall either be served personally or sent by first class mail, postage prepaid, addressed as follows:

To Grantor:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

To Grantee:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

10. Controlling Law: The interpretation and performance of this Reservation of Access Easement and Restriction on Use shall be governed by the laws of the United States or, if there is no applicable federal law, by the law of the State of Washington.

11. Liberal Construction: Any general rule of construction to the contrary notwithstanding, this Reservation of Access Easement and Restriction on Use shall be liberally construed in favor of the restrictions and reservations to effect the purposes of this Reservation of Access Easement and Restriction on Use and the policy and purpose of CERCLA, 42 U.S.C. § 9601 et seq. If any provision of this Reservation of Access Easement and Restriction on Use is found to be ambiguous, an interpretation consistent with the purpose of this Reservation of Access Easement and Restriction on Use that would render the provision valid shall be favored over any interpretation that would render it invalid.

12. Severability: If any provision of this Reservation of Access Easement and Restriction on Use, or the application of it to any person or circumstance, is found to be invalid, the remainder of the provisions of this Reservation of Access Easement and Restriction on Use, or the application of such provisions to persons or circumstances other than those to which it is found to be invalid, as the case may be, shall not be affected thereby.

13. Entire Agreement: This Reservation of Access Easement and Restriction on Use sets forth the entire agreement of the parties with respect to rights and restrictions created hereby, and supersedes all prior discussions, negotiations, understandings, or agreements relating thereto, all of which are merged herein.



14. Reserved Rights of Grantee: Grantee hereby reserves unto itself, its successors, transferees, and assigns all rights and privileges in and to the use of the Property that are not incompatible with the exercise of the restrictions on use and reservation of an environmental protection easement reserved in this Reservation of Access Easement and Restriction on Use.

15. Joint Obligation: If there are two or more parties identified as Grantor or Grantee herein, the obligations imposed by this Reservation of Access Easement and Restriction on Use upon them shall be joint and several.

16. Successors: The Grantor and Grantee intend that the covenants, terms, conditions, and restrictions of this Reservation of Access Easement and Restriction on Use shall be binding upon, and inure to the benefit of, the parties hereto and their respective personal representatives, heirs, successors, and assigns and shall continue as a servitude running in perpetuity with the Property. The term "Grantor", wherever used herein, and any pronouns used in place thereof, shall include the persons and/or entities named at the beginning of this document, identified as "Grantor" and their personal representatives, heirs, successors, and assigns. The term "Grantee", wherever used herein, and any pronouns used in place thereof, shall include the persons and/or entities named at the beginning of this document, identified as "Grantee" and their personal representatives, heirs, successors, and assigns. The rights of the Grantee and Grantor under this Reservation of Access Easement and Restriction on Use are freely assignable, subject to the notice provisions hereof.

17. Captions: The captions in this Reservation of Access Easement and Restriction on Use have been inserted solely for convenience of reference and are not a part of this Reservation of Access Easement and Restriction on Use and shall have no effect upon construction or interpretation.

18. Counterparts: The parties may execute this Reservation of Access Easement and Restriction on Use in two or more counterparts, which shall, in the aggregate, be signed by both parties; each counterpart shall be deemed an original as against any party who has signed it. In the event of any disparity between the counterparts produced, the recorded counterpart shall be controlling.